Office Supreme Court, U.S.
FILED
AUG 23 1957
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 961

MAX OSSIO, ARTHUR MEYER, CHESTER D. HAZEL, LOUIS J. CACIO, PAUL E. DEMPSTER, JERRY L. DIMITRATOS and CHARLES A. TUCKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California.

AARON SAPIRO,
CHARLES M. ARAK,
CHARLES P. SCULLY,
[illegible] Market Street,
San Francisco, California,
Attorneys for Petitioners.

Subject Index

	Page
Citations and opinions below	2
Jurisdiction	2
Questions presented	3
Statement of the case	4
Reasons for granting the petition	9
All of the defendants were denied a fair trial in violation of the requirements of due process because this case was intentionally channeled into a particular court	10
Defendants' conviction is based solely upon inferences and not upon a single piece of direct testimony, all in violation of the requirements of due process of law	15
The conditions of probation as to Osslo and Meyer constitute the imposition of a cruel and unusual punishment	19
Conclusion	25

Table of Authorities Cited

Cases

	Pages
Cole v. Arkansas, 333 U.S. 196	9
Lee v. Superior Court, 89 Cal. App. 2d 716	20
Manning v. John Hancock Mutual Life Ins. Co., 100 U.S. 693	18
People v. Hainline, 219 Cal. 532	20
Rochin v. People of California, 342 U.S. 165	10
Trop v. Dulles, 78 S. Ct. Adv. 590	19, 25
Weems v. United States, 217 U.S. 349	19
Zamlock v. Municipal Court, 106 Cal. App. 2d 260 (1951)	13

Constitutions

United States Constitution: Pages
Eighth Amendment 3, 19
Fourteenth Amendment 3, 9, 19

Statutes

California Penal Code:
Section 1050 13
Section 1053 10
28 U.S.C. 1257 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No.

MAX OSSLO, ARTHUR MEYER, CHESTER D. HAZEL, LOUIS J. CACIO, PAUL E. DEMPSTER, JERRY L. DIMITRATOS and CHARLES A. TUCKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California.

Petitioners, Max Osslo, Arthur Meyer, Chester D. Hazel, Louis J. Cacio, Paul E. Dempster, Jerry L. Dimitratos and Charles A. Tucker, pray that a writ of certiorari issue to review the judgment of the Su-

preme Court of the State of California rendered on March 26, 1958.

CITATIONS AND OPINIONS BELOW.

The judgment of the Superior Court of the State of California in and for the County of San Diego, a court of general jurisdiction, dated August 27, 1956, is unreported and is printed in Appendix 'A' hereto, infra, page 1. The opinion of the Fourth District Court of Appeal of the State of California, dated May 23, 1957, printed in Appendix 'B' hereto, infra, page 8, is unreported but found in 150 A.C.A. 953. The opinion of the Supreme Court of the State of California, dated March 26, 1958, printed in Appendix 'C' hereto, infra, page 35, is reported in 50 A.C. 1.

JURISDICTION.

The judgment of the Supreme Court of the State of California was entered on March 26, 1958. Appendix 'C', page 35, infra. A timely petition for rehearing was filed and denied on April 23, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED.

The decision of the Supreme Court of the State of California in this matter raises the following questions:

1. Are defendants, in a criminal action in which they are charged with conspiracy to commit the crime of assault and assault by means of force likely to produce great bodily injury, denied a fair trial in violation of the requirements of due process of law by virtue of the fact that the action is purposely and intentionally channeled into a particular court so that it would be heard by a particular judge, and no other?

2. Are defendants, in a criminal action in which they are charged with conspiracy to commit the crime of assault and assault by means of force likely to produce great bodily injury, denied a fair trial in violation of the requirements of due process of law by virtue of the fact that their conviction rests solely upon inferences in the absence of a single piece of direct testimony showing the existence of any element of conspiracy?

3. In such an action, where the defendants Osslo and Meyer are full-time paid officials in a labor organization, does the imposition of the requirement, as one of the conditions of probation, that such defendants sever all official connection with any labor organization and that they receive no further compensation or gratuity from any such labor organization, constitute an imposition of a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE.

On January 19, 1956, defendants Osslo, Meyer, McFaden, Dimitratos, Dempster, Hazel, Tucker and Cacio were charged with conspiracy to commit the crime of assault and charged with assault by means of force likely to produce great bodily injury. On March 16, 1956 all of said defendants entered pleas of "not guilty" and this matter was set for trial, by stipulation, on July 9, 1956 at 10 a.m. On August 9, 1956, all of the defendants were found guilty on both charges mentioned above after trial by jury.

The facts leading up to the above mentioned charges involve an altercation at Ferguson's Market in Chula Vista, California on October 22, 1955 between defendants, Cacio, Tucker and Dempster and two members of the Retail Clerks Union.

On October 22, 1955, and for many years prior thereto, Osslo was secretary-treasurer of Butchers Union Local #229, in San Diego, California, and was also a vice-president of the California State Federation of Labor, AFL-CIO. McFaden and Meyer were business agents for the same local union. Hazel, Dempster, Dimitratos and Tucker were members of the Sailors Union of the Pacific, and Cacio was a member of the Teamsters Union.

On October 22, 1955, and for several months prior thereto, there had existed a jurisdictional dispute between the Butchers Union and the Clerks Union in the San Diego, California, area. This dispute was primarily concerned with the handling of prepared

and pre-cooked meats and the sale of these products in grocery stores and super-markets.

Osslo was not present at the altercation above mentioned but was tending to usual union affairs during the days of the 21st and 22nd of October, 1955, and his first knowledge of the incident at Ferguson's was when he was advised that defendants Cacio, Dempster, Dimitratos, Hazel and Tucker had been arrested. Meyer and McFaden were at Ferguson's Market but were not placed anywhere near the scene of the trouble and there was no evidence whatsoever that included them in the alleged assault.

The record shows that on October 13, 1955, the Clerks Union caused Ferguson's Market at El Cajon, California, to be picketed and representatives of the Butchers Union reported to Osslo that they had been frightened and intimidated by certain action of the Clerks' representatives, whereupon Osslo telephoned Harry Lundeberg, secretary of the Sailors Union of the Pacific and also a vice-president of the California State Federation of Labor, AFL-CIO, requesting assistance from the latter to protect the business agents of Butchers Local Union #229. Then Dimitratos and Hazel flew to San Diego from San Francisco on October 15, 1955 and they conferred with McFaden. On that date, Osslo was in the Hawaiian Islands attending a conference.

On October 19, business representatives of Butchers Union Local #229, accompanied by Hazel and Dimitratos were intimidated by representatives of the

Clerks Union at Tang's Market in the City of San Diego, by the display of a knife and what appeared to be a gun in a shoulder holster.

Because of this incident, Dimitratos and Hazel requested McFaden to telephone Osslo in Honolulu to suggest that additional assistance be obtained from San Francisco. Osslo concurred in this suggestion and Tucker, Cacio and Dempster were requested by Dimitratos to come to San Diego from San Francisco. On the morning of October 22, 1955, Tucker, Cacio, Dempster, Dimitratos and Hazel went to the Butchers Union Hall in San Diego where they met with business agents for the Butchers Union. These five men then went to Ferguson's Chula Vista Market in the company of McFaden, Meyer and Jackson, the latter being another business representative of the Butchers Union Local #229. Osslo did not accompany them on this trip.

After stopping at Ferguson's Chula Vista Market, McFaden asked to see the partner and manager of that concern, but was told to return at 1 p.m. They then went to several other markets and returned to Ferguson's at the appointed time.

All of the above mentioned persons went into the store, McFaden, Jackson and Meyer remaining near the entrance in order to talk to the partner and manager of the store. At the time of their arrival, however, Maurer and Montgomery, both representatives of the Clerks Union, were in the store and had been there for some time. An altercation ensued in which

Cacio and Maurer were injured, the former being unable to leave the store under his own power. The evidence is in sharp conflict as to which party or parties initiated the altercation.

Upon conviction, on August 27, 1956, motion was made on behalf of all defendants for probation. This motion was denied as to defendants, Hazel, Dimitratos, Cacio, Tucker and Dempster, but was granted as to defendants Osslo, McFaden and Meyer, in the following terms:

(a) That Osslo and McFaden were each to be fined $1,500 and that Meyer was to be fined $750; that these fines were to be paid from the personal funds of each of them;

(b) That Osslo and McFaden were to serve six months in the County Jail and that Meyer was to serve three months in the County Jail;

(c) That Osslo, McFaden and Meyer were to be placed on probation for a period of ten years; and

(d) That during the entire ten-year probationary period Osslo, McFaden and Meyer were to refrain from performing any services for any union; that they were to receive no salary or gratuity from any labor organization; that they were to resign from any offices in any labor organization that they may hold; that they were prohibited from acting as business agents or participating in any negotiations or act in any official capacity with respect to any labor organization during the entire ten-year period; that the trial judge, Judge John A. Hewicker would retain

sole jurisdiction over the file and the case for the entire ten-year period.

On August 27, 1956, notices of appeal were filed on behalf of all defendants and application for bail pending appeal was denied. On September 4, 1956 a petition for writ of habeas corpus, or in the alternative an application for stay of judgment and bail and for bail pending appeal was filed in the Supreme Court of the State of California on behalf of Osslo, Meyer and McFaden. The Supreme Court of the State of California subsequently granted this petition and made its order releasing these defendants on bail pending determination of this matter on appeal. A similar order was issued by the California Supreme Court on October 10, 1956 with respect to the remaining defendants.

On January 3, 1957 an appeal was filed in the District Court of Appeal of the State of California, Fourth Appellate District, on behalf of all defendants, and on May 13, 1957 that Court rendered a decision sustaining judgments of the trial court as to each of them.

On May 27, 1957, a petition for hearing in the Supreme Court of the State of California was filed on behalf of all defendants, which petition was granted.

On March 26, 1958, the California Supreme Court rendered a decision, three Justices dissenting, sustaining the judgment of the trial court except that the condition of probation that Judge Hewicker retain sole jurisdiction over the file and the case was ordered stricken.

On April 9, 1958, a petition for rehearing was filed with the Supreme Court of the State of California which was denied April 23, 1958.

On appeal, defendants have consistently contended that the verdict and judgment were not sustained by the evidence and were contrary to the evidence and to the law; that the punishment imposed as to Osslo, McFaden and Meyer is improper, excessive and unauthorized and constitutes cruel and unusual punishment in violation of constitutional protection extended to every accused in a criminal trial; that all of the defendants were denied a fair trial in violation of the requirements of due process because this case was intentionally channeled into a particular court to be heard by a particular tribunal.

REASONS FOR GRANTING THE PETITION.

None of the questions presented by this petition has been expressly decided by this Court and each of the questions is largely one of first impression going directly to fundamental concepts of civil rights guaranteed to all persons.

It is clear that the Fourteenth Amendment to the United States Constitution requires that an accused in a criminal action be afforded a fair trial by an impartial tribunal. It is equally clear that this requirement is applicable to all phases and aspects of the trial. *Cole v. Arkansas*, 333 U.S. 196.

Furthermore, this Court has held that where acts of state officials prior to the trial prevent the holding of

a fair and impartial hearing, there has been a denial of the rights guaranteed to every accused and that the conviction, based upon such trial, is a denial of due process and requires a reversal. *Rochin v. People of California*, 342 U.S. 165.

ALL OF THE DEFENDANTS WERE DENIED A FAIR TRIAL IN VIOLATION OF THE REQUIREMENTS OF DUE PROCESS BECAUSE THIS CASE WAS INTENTIONALLY CHANNELED INTO A PARTICULAR COURT.

It is conduct of the type mentioned in the above cited cases, prior to the trial in this matter, which prevented a fair and impartial hearing as to all of the defendants because the prosecution of all of the defendants herein was purposely and intentionally channeled into a particular court so that it could be heard by Judge John A. Hewicker and no other. This was apparent from the beginning from statements in the press and from conduct of the court and the District Attorney. This proposed procedure was objected to as being in violation of California law.[1]

---

[1] § 1053 California Penal Code:

"If after the commencement of the trial of a criminal action or proceeding in any court the judge or justice presiding at such trial shall die, become ill, or for any other reason be unable to proceed with the trial, any other judge or justice of the court in which the trial is proceeding may proceed with and finish the trial; or if there be no other judge or justice of that court available, then the clerk, sheriff, marshal or constable shall adjourn the court and notify the Chairman of the Judicial Council of the facts, and shall continue the case from day to day until such time as said chairman shall designate and assign a judge or justice of some other court, and such judge or justice shall arrive, to proceed with and complete the trial, or until such time as by stipulation in writing be-

Without regard to the fact that certain courts might be available before Judge Hewicker's and without regard to the fact that the trial then in progress in his court might take a long time, the court flatly stated that:

> ". . . the first court available will be judge Hewicker, the regular criminal department. There are no other courts available except this one. . . ." (Tr. 4, lines 6-8.)

This clearly indicated that under no condition was this case to be heard in any other court, regardless of the circumstances which might prevail. This intent to channel is evident from the court's further statement:

> "I have *conferred* with Judge Hewicker and, under the circumstances and in view of the objection of counsel, I would not feel inclined to go ahead (without a selection of a jury) . . . so the case will be continued until two o'clock at which time the defendants, and all attorneys, and the jury is asked to return. If we are not ready then, why we will have to have continuances half a day at a time until we have *a court available* to try this case. I can't tell you exactly when that will be, but the case in Judge Hewicker's court may terminate at any moment, as any case may, or it may take the rest of the week, but there

tween the prosecuting attorney and the attorney for the defendant, filed with the court, a judge or justice shall be agreed upon by them, and such judge or justice shall arrive to complete said trial. The judge or justice authorized by the provision of this section to proceed with and complete the trial shall have the same power, authority and jurisdiction as if the trial had been commenced before such judge or justice."

is no alternative to that procedure. . . ." (Emphasis added.)

(Tr. 4, lines 11-21.)

This remained the status of the proceedings from Monday, July 9, 1956, until the case was finally assigned for trial in Judge Hewicker's court. All of the parties concerned were required to appear two and three times a day to determine whether or not that department was avaliable, although other departments were available:

"I have been advised, and I think, correctly, that Judge Glen's court completed a case yesterday, and that another case was assigned yesterday afternoon to that court, a case on tax liens, and I think we were entitled to precedence, that we were entitled to immediate trial at that time."

(Tr. 9, lines 8-12.)

"The defendants have been ready for immediate trial, which they consider to be their right, since Monday. They have been advised by the Judges that no Courts have been available. Now we know that there have been new cases sent to Judge Mundo, to Judge Shell, and at least two new cases sent to Judge Glen during this period. The Courts have said the Courts are not available and have required the counsel and the defendants to report twice and three times a day since Monday to hear this statement. Now we would like to make our objection on the ground that we believe that the Courts have made this statement that the Courts were not available because of the fact that the Courts have desired to channel this case into Department 4 in accordance with the statement

made in Exhibit 'A', which is a newspaper account of an interview with the District Attorney in which this statement was made. We respectfully wish to state that the defendants feel that their constitutional rights have not been observed and that they have been—well, they have not been given the full information, as to the legal status of these cases."

This was a complete disregard of the policy of the State of California[2] inherent in the preference statutes demanding a prompt determination of criminal matters which, it has been held, is not a policy to be "lightly disregarded". *Zamlock v. Municipal Court*, 106 C.A. (2d) 260 (1951).

The majority of the California Supreme Court concedes that an "individual judge (as distinguished from

[2] § 1050 California Penal Code:

"The court shall set all criminal cases for trial for a date not later than thirty (30) days after the date of entry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. Provided that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which he is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance, but such continuance for such reason shall not exceed thirty (30) days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the court shall enter in its minutes the facts proved which require the continuance. Criminal cases shall be given precedence over civil matters and proceedings. If any court is unable to hear all criminal cases pending before it within thirty (30) days after the respective defendants have entered their pleas, it must immediately notify the Chairman of the Judicial Council."

a court) is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of the court, and the jurisdiction which the judge exercises is the jurisdiction of the court, not the judge." (50 A.C. 1, 29.) The conclusion of the majority was made in reference to one of the conditions of probation which provided: "I want also to make this order at this time, that I intend to retain jurisdiction over this file and over this case so that nobody will slip in on a Saturday morning and get some other judge to terminate the probation or to modify it. That will be part of the probation, I will retain jurisdiction over the file." (Tr. 2364, lines 14-20.)

The California Supreme Court ordered that this portion of the order granting probation as to Ossio, McFaden and Meyer be stricken therefrom under the theory that the desire of the trial judge to retain exclusive jurisdiction as to the file and the case during the entire ten-year period of probation, and his order to that effect was improper.

This last statement shows a complete distrust, on the part of Judge Hewicker for other judges and indicated that for some reason this judge felt particularly qualified to try the case and retain *sole* jurisdiction for ten years thereafter. The statement, above quoted, lends conclusive support to petitioners' contentions that it was the intent of the court that this case be heard only before Judge Hewicker and that he retain sole jurisdiction of this case from the beginning of the trial in this matter to the end of the probationary period as to all defendants. Such an in-

tent is not eliminated by the fact that the condition of probation requiring sole jurisdiction of Judge Hewicker was ordered stricken by the California Supreme Court.

Certainly, it would appear obvious from the foregoing statements of the judge and the court that Judge Hewicker took a highly personal interest in this case and that such an interest manifestly would prevent an unimpassioned and impartial trial in his court. Thus, the conclusion is unavoidable that all defendants in this matter have been denied a fair and impartial trial in violation of the requirements of due process of law.

In addition, the numerous acts of misconduct on the part of the district attorney, and the errors of law of the trial judge, conceded by the majority of the California Supreme Court, adds support to petitioners' contentions with respect to channeling.

DEFENDANTS' CONVICTION IS BASED SOLELY UPON INFERENCES AND NOT UPON A SINGLE PIECE OF DIRECT TESTIMONY, ALL IN VIOLATION OF THE REQUIREMENTS OF DUE PROCESS OF LAW.

The prosecution alleged fifteen overt acts insofar as the charge of conspiracy to commit assault is concerned. Defendants admitted all of said overt acts which are as follows:

(a) That Ossio had a conversation with Harry Lundeberg, on or about October 13, 1955, in San Diego;

(b) That Dimitratos and Hazel met in San Diego on or about October 15, 1955;

(c) That McFaden, at Osslo's request, made reservations for three rooms at the U. S. Grant Hotel in San Diego on or about October 14, 1955;

(d) That McFaden, Dimitratos and Hazel met at the U. S. Grant Hotel on or about October 15, 1955;

(e) That Dimitratos and Hazel met at Butchers' Local 229, 227 E. Street, San Diego, on or about October 17, 1955;

(f) That Dimitratos, Hazel and Meyer, and other representatives of butchers' local met at Tang's Market, 4508 Cass Street, San Diego on or about October 18, 1955;

(g) That Dempster, Cacio and Tucker met in San Diego, on or about October 21, 1955;

(h) That Dempster, Cacio, Tucker, Dimitratos and Hazel met at the Ace Motel, San Diego, on or about October 21, 1955;

(i) That Dempster, Cacio, Tucker, Dimitratos and Hazel accompanied McFaden and Meyer to Ferguson's Market in Chula Vista on or about October 22, 1955;

(j) That Dempster, Cacio, Tucker, Dimitratos and Hazel were in a certain Ford sedan leased by butchers' local in San Diego on October 22nd;

(k) That Osslo and/or McFaden agreed to pay Dimitratos his expenses and a weekly salary on or about October 15, 1955;

(l), (m), (n), (o) That there was a similar agreement with Hazel, Tucker, Dempster and Cacio.

The majority opinion, at page 24, concludes that the defendants apparently intended to plan the assault which arose at Ferguson's Market. It should be noted that there was not one statement in the entire record nor was there one piece of direct testimony to the effect that such an assault was planned. In other words, the majority opinion reaches that conclusion by inference only. Not only was there a complete lack of direct testimony as to the existence of a conspiracy, but even if that were admitted for purposes of argument, there is not one word of direct evidence to justify the inference that the object of the conspiracy was to be an assault. By virtue of the fact that the trial court, as well as the majority of the California Supreme Court reached the conclusion of conspiracy by inference only, the defendants did not get a fair trial on that issue inasmuch as the question to be proved had been assumed and predetermined from the beginning.

As stated by the dissenters, "the People argue that from the above alleged overt acts, a jury could reasonably infer that a conspiracy to commit assault existed between the defendants; that the jury could reasonably determine that Osslo, with the knowledge and approval of McFaden and Meyer procured the services of the five sailor defendants for the purpose of intimidating the Clerks 'by their appearance and that if this was not sufficient, perpetrating an assault upon the clerk who should happen into their proximity'.

"There is evidence in the record which tends to prove all of the alleged overt acts. As I read the record, however, there is no evidence (and the People point to none) that the fight was planned, or premeditated, or that any of the proved overt acts lead to that conclusion. Assuming that Cacio provoked the altercation and that Maurer did not (although the evidence is extremely close on that point), telephone calls between the defendants, payment of expenses, salaries and the making of hotel reservations do not lead to the conclusion that defendants were engaged in a conspiracy to commit an assault. The People argue, by quoting from the remarks made by the trial court, that because the five defendants were furnished bail, counsel, and their salaries were paid after the assault, that the assault had been planned between all defendants prior to its commission . . . It is my conclusion that the alleged and proved overt acts charged against these defendants do not support the judgment convicting them of conspiracy to commit assault." (50 A.C. 1, 37.)

There was much testimony on the part of all the defendants who testified in this matter that none of them had any thought of violence or expectation of violence but that the fight at Ferguson's Market was a spontaneous and unanticipated outburst.

The inferences of the California Supreme Court based upon other inferences, without the support of any direct testimony whatsoever is clearly contrary to the holding of this Court in *Manning v. John Hancock Mutual Life Ins. Co.*, 100 U.S. 693, wherein this Court noted that whenever circumstantial evidence

is relied upon to prove the fact, the circumstances must be proved and not themselves be presumed. Here, the circumstances were not only predetermined, but were inferred from overt acts which are normal in and of themselves and which are admitted by all the defendants.

THE CONDITIONS OF PROBATION AS TO OSSLO AND MEYER CONSTITUTE THE IMPOSITION OF A CRUEL AND UNUSUAL PUNISHMENT.

As to defendants Osslo, Meyer, and McFaden, the imposition, as a condition of probation of the requirement that those defendants not hold office in any union or receive salary for any services in any union or participate in any union negotiations for a period of ten years and that they be required to fill out an annual affidavit that the fine payments were made from their own funds and that they held no union office, clearly constituted a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

It has been consistently noted by this Court that where there is a gross disparity between the punishment and the crime for which the punishment is imposed, it constitutes a cruel and unusual punishment which is repugnant to the Eighth Amendment to the Constitution of the United States. *Weems v. United States*, 217 U.S. 349. In a recent decision in *Trop v. Dulles*, 78 S. Ct. Adv. 590, this Court again noted that the imposition of a punishment which is in total disproportion to the charge, constitutes a violation of the Eighth Amendment to the United States Constitution.

The principle of probation in the State of California has been stated to be an "act of grace and clemency, which may be granted by the court to a seemingly deserving defendant whereby he may escape the extreme orders of the penalty imposed by law for the offense of which he stands convicted." *People v. Hainline,* 219 Cal. 532, 534; *Lee v. Superior Court,* 89 Cal. App. 2d 716, 717.

In the instant case, the trial court, in its terms of probation, does not attempt to permit defendants Osslo, McFaden or Meyer to escape the extreme rigors of the penalty imposed by law for seemingly deserving defendants, and adopts a course of conduct which, in the final analysis, aggravates and increases the penalty that would have resulted from confinement under the maximum prescribed by law.

In furtherance of the trial court's attempt to impose this cruel and unusual punishment on these defendants, the trial court, on August 29, 1956, filed and caused to ~~be presented~~ to the defendants, an "affidavit in connection with the terms of probation". This affidavit was presented over the signature of the trial judge to the defendants for their signatures and is another phase of the trial court's persistent attempt to force this cruel and unusual punishment on these defendants immediately and in spite of the appeal pending at that time.

It will be noted that this affidavit, set out below, contains harsh terms far in excess of the original judgment. The real effect of these additional stringent requirements would be to completely and immediately

destroy the continuance of these three defendants personally and officially in the labor movement of the State of California.

"State of California
County of San Diego—ss:

Affidavit in Connection with Terms of Probation.

....., being first duly sworn, deposes and says: That he is one of the defendants in the above entitled matter and that this affidavit is made in conformity with the probation order made on August 27, 1956, in the above proceedings.

That since the granting of probation herein said affiant has not drawn any salary or gratuity from any Labor Union except such as may have been due for services performed and rendered prior to August 27, 1956.

That affiant has received no funds directly or indirectly from any Labor Union, or member thereof, for the purpose of paying the fine imposed on affiant in this case, and that no assessment has been levied against or on any Labor Union member by any Labor Union for the purpose of paying said fine.

That in accordance with the terms of probation, affiant has held no elective or appointive office in any duly constituted Labor Union since September 1, 1956, and that all offices held prior to said date by affiant have been terminated by resignation. This includes any office or designation in any Labor Union for which compensation from the Union would be received.

That affiant has complied with any and all terms of probation, imposed by said court, up to

and including the date of the signing of this affidavit.

Subscribed and sworn to before me this ..... day of ....., 1956.

.....

Notary Public in and for the County of San Diego, State of California.

(The foregoing affidavit shall be signed by each probationer during the month of January of each year, or more often, if requested, while probation shall be in full force and effect, and is a condition precedent to permit probationer to remain on probation.)

By order of the Court.

John A. Hewicker
Judge of the Superior Court"

The trial court in its judgment and subsequent action, has abandoned the real theory of probation for probation is designed to rehabilitate and to restore deserving persons to that position which they held in society prior to the commission of any offense.

In this case, the trial court has used probation as a weapon and has inflicted upon the defendants a punishment more severe and cruel in scope than any non-probationary sentence he could have pronounced.

The effect of probation here imposed was the requirement of complete severance of all ties with any labor organization other than "ordinary membership" and the severance of any position of leadership in such organizations, in spite of the fact that defendants had been connected with such organizations for

many years. In effect, it constituted not only a complete removal of their ability to earn a living in the only type of work they had known for a number of years, but it also destroys their standing in the community which had previously been unblemished and had been built up through service to the community and to labor, only because they were in a position of leadership in the labor movement; thus, both of the important factors in the process of rehabilitation are completely negated.

The alleged probation herein is not an act of grace or clemency but is tantamount to the cutting off the productive abilities of these defendants for ten years. In this, it violates the principle that the terms and conditions of probation must be reasonable under the circumstances.

The theory of the law is that trial courts must be intelligently just and humane in sentencing. It is submitted that the instant sentence is not just or humane.

Even more reprehensible is the harassment not only of these defendants, but their immediate families and other innocent persons not subject to the jurisdiction of the trial court, by methods aimed at rendering them destitute.

Here a trial court has used a tool of mercy as a weapon of punishment.

In addition to the unusual nature of the punishment, its cruelty is demonstrated by the fact that some of the men are of mature years, to whom a ten year

loss of productive life is tantamount to permanent removal from the stream of life in which they have long been active and in which they have been clean and successful.

It is no longer necessary to claim that the punishment must be equivalent to the "rack and screw" in order to claim that a punishment is cruel. If we claim to be a civilized society, we must judge the punishment according to modern, rather than medieval standards.

In addition to fine and confinement in the County Jail, it requires these defendants to resign from all posts in any Labor Union and to continue to be disassociated from any such posts, including any participation in negotiations, for the entire ten-year period of probation.

This portion of the judgment is a new and startling use of judicial authority; and it is the first instance on record in California, where a court has attempted to completely destroy the official connection for legitimate purposes of any union leader with his union.

Clearly, such a penalty is totally disproportionate to the crime of which these defendants were charged and is particularly startling in view of the fact that neither McFaden nor Meyer participated in the alleged assault and that Osslo was not even present at Ferguson's Market on October 22, 1955 when the fight took place.

The circumstances of this case in this respect fall squarely within the concept enunciated by Justice

Brennan, who stated in his concurring opinion in *Trop v. Dulles*, 78 S. Ct. Adv. 590, *supra*, at page 604:

> "It is perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender back into the useful paths of society it excommunicates him and makes him, literally—an outcast. I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior, more likely to pursue further a career of unlawful activity than to place on him the stigma of the dereliet, uncertain of many of his basic rights."

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Dated, San Francisco, California,
April 25, 1958.

Respectfully submitted,
AARON SAPIRO,
CHARLES M. ARAK,
CHARLES P. SCULLY,
Attorneys for Petitioners.

(Appendices A, B and C Follow.)

The Court. Very well. Chester D. Hazel, Louis J. Cacio, Paul E. Dempster, Jerry L. Dimitratos, and Charles Tucker, no legal cause having been shown why judgment should not be pronounced, it is the judgment and sentence of the Court that you be confined in the State Prison of the State of California, for the term prescribed by law. The Sheriff of this County is ordered to deliver the defendants, and each of them, to the California Institution for men at Chino, forthwith.

It is the further order of the Court that Count one of the indictment run concurrent with Count two of the indictment, and not consecutive, and that you each serve more than the minimum term in this case.

* * * * * * *

The Court. Now, as to the defendants Osslo, Meyer, and McFaden, I have read the reports. Mr. Osslo, I have known for a number of years, quite a few years myself. Mr. Meyer and Mr. McFaden I have not known. They have received—Mr. Osslo has received many letters here on his behalf, and this morning Judge Weinberger called in to express the wish that probation be granted. Now, I don't want you gentlemen to feel that because someone had a lot of letters in here, that it influenced the Court's verdict or decision. I consider these reports. As far as the probation officer's recommendation is concerned, I like to receive it, I like to get his reaction, but I

consider it, but I have never yet sent anybody to the penitentiary because the probation officer recommended it, when I didn't think the man should go. But I do appreciate the various recommendations that the probation officers make. I think in this case there were full and complete probation reports made as to each defendant.

Now, although I am going to grant these defendants probation, of course probation is a privilege and they are going to have to comply with it. If they don't like the terms, of course they don't have to accept probation. When I get through here, I want you to tell me. You can confer with your clients, and tell me whether you want to accept probation.

Now, here about four years ago three labor officials were convicted in this County and not in my Court, glad I don't get them all, it happened to be in Department 8, and in that case the defendants were given three years probation and I think they were each fined $2500.00. And I think about four months later probation was terminated, when the fines had been paid. But each morning before I come to the Court House, I stop at various little places on the way, and I get a cup of coffee. And after the fines had been paid in those cases, the little girl that waited on me and gave me my cup of coffee, she says, "Judge, I know you didn't handle that case, but for gosh sakes, if you get any other case in the future, please don't fine the defendants because all that happens is they levy an assessment on the members and we have to pay it." So she says: "Don't fine them." and she

says: "If there is any way they can make them serve a jail term, don't give them that, because we don't want to serve that either." So I told her, "I hope I never get one of those cases." But here we are.

Now, I noticed in the U. S. News and World Reports, the magazine which I subscribe to, I looked for it last night but I guess I took it along on vacation and left it at some ~~place~~ of lodging. I couldn't find it. But in that U. S. News and World Report, there was an interview with—who is that Longshoreman from New York, Moffa?

Mr. Sapiro. Hoffa.

Mr. O'Laughlin. He is a teamster.

Mr. Sapiro. Yes, he is a teamster.

The Court. Sorry I got them mixed up. I have seen a lot in the paper where Hoffa is going to take over the teamsters union. Somebody suggested, I don't know who it was, that Mr. Hoffa had a criminal record, and there were allegations that a lot of Mr. Hoffa's Lieutenants had criminal records. So this man from the U. S. News and World Report, I think that is the magazine, I may be mistaken, he interviewed Mr. Hoffa and asked him about it and Hoffa said: "Well, I tell you this. There has been a lot in the papers and a lot of charges for years, that members of my Union have criminal records." He said: "I never inquire of a man when I take him on in my Union, whether or not he has a criminal record." He says: "I think it is none of my business. When we make him an officer and official of the Union, all we are concerned about is that he does a good job. If

he does a good job, I don't care what his background is." Mr. Hoffa further stated, he said: "If there is any objection to officers in the Union being members, having a criminal record, if there is any objection to that, it is up to the Courts or the other authorities to take care of that. I am not going to do it." Taking Mr. Hoffa's cue, I am sorry he put the burden on me, but I am going to accept it. So, I am not going to have anybody say I was derelict in my duty. I am going to give each of these defendants here ten years probation. And as far as Osslo and McFaden are concerned, I am going to fine them $1,500.00 each, and they are going to have to pay that fine out of their own pocket. And each January, during the term, the time they are under probation, they are going to have to file under oath with the Probation Department, an affidavit that they have not received from the Union or anyone on a Union's behalf, any moneys to pay these fines, and that these fines were paid from their own personal funds. I can't, of course, make the Union submit their books, but I tell you frankly, if I ever find out that an assessment has been levied on any of the butchers in this community, or any money has been received from any other interlocking union, and that this fine has been paid with this money and turned over to Mr. Osslo, Mr. McFaden or Mr. Meyer, I am going to revoke probation. I didn't include Mr. Meyer in the fine because I fixed the fine of the other two defendants at $1,500.00. The Jury in this case recommended leniency for Mr. Meyer and I am cer-

tainly going to follow the recommendation of the Jury. Instead of Mr. Meyer paying $1,500.00, he will pay $750.00. And these defendants are going to have to do some time in custody. And this fine of $1,500.00 each and $750.00 will be paid at the rate of $50.00 per month, beginning 60 days after they get out of custody.

As far as the defendants Osslo and McFaden are concerned, they will be placed in the custody of the Sheriff for a period of six months. As far as the defendant Meyer is concerned, he will be in custody for three months. And they will get time off for good behaviour, five days for every thirty days.

Now, there is one other condition of this probation, and it was suggested by Mr. Hoffa. These defendants will not hold any office with any Union during this period of time. They will belong to the Union and act like any other Union member. They will not be an officer or business agent or whatever you call it. They will receive no salary from the Union for any services they may render, and they will have to resign any office they now hold of business agent or whatever it happens to be, when this judgment becomes final. Of course, if an appeal is taken and the case is reversed on appeal, if the Union wishes to keep you on as an officer, I can't do anything about it, because the minute you file the notice of appeal, I lose jurisdiction on it. But during this period, you are not to hold—none of you are to hold any office with any Union, act as any business agent or participate in any negotiation.

I am going to try to keep labor relations in this community peaceful. Severe acts of violence could be much worse, and there is absolutely no excuse for bringing in San Francisco people, especially of the character of the people that were brought down here to act as guards or observers or whatever you want to call them. All you have to do is give one look at those defendants, and especially if you know what kind of record they have. You know they are going to have trouble. And whoever chose these men, whether it be Lundeberg or Dimitratos, or whoever it was, why I think he did everyone a great deal of injustice, and maybe what has happened here will prevent Mr. Lundeberg in the future from sending out his men to participate in labor disputes, other than those in which his own men are involved, where they have an interest of their own. I don't believe in other Unions stepping in and taking over, especially from another jurisdiction. If you have them in the local community, that is all right, but to send people in from another jurisdiction, especially the type of people that were sent in here, if there is anything I can do to stop it, I am going to stop it.

These defendants are making motion to remain on bail pending their appeal. That motion will be denied too, so I will treat everybody alike.

Mr. Sapiro. May I make one point clear, your Honor please?

The Court. Yes.

Mr. Sapiro. You stated a limitation on the right to hold office in a Union. Did you mean that that is to apply during the entire period?

The Court. It will apply during the entire period unless I see fit at any other time to modify it. I want to also make this order at this time, that I intend to retain jurisdiction over this file and over this case, so that nobody will slip in on a Saturday morning and get some other Judge to terminate the probation, or to modify it. That will be part of the probation, I will retain jurisdiction over the file.

Appendix B

(Vol. 150 A.C.A. 953.)

In the District Court of Appeal
State of California
Fourth Appellate District

4 Criminal No. 1306

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
MAX OSSLO, JOSEPH MCFADEN, ARTHUR MEYER, CHESTER D. HAZEL, LOUIS J. CACIO, PAUL E. DEMPSTER, JERRY L. DIMITRATOS and CHARLES A. TUCKER,
Defendants and Appellants.

OPINION

Appellants were charged in count one of an Indictment with conspiracy to commit the crime of Assault (Pen. Code, Sec. 182) and in a second count with the crime of Assault by Means of Force Likely to Produce Great Bodily Injury (Pen. Code, Sec. 245) in that on or about October 22, 1955, they did wilfully, unlawfully and feloniously commit an assault by means of force likely to produce great bodily injury upon the person of one John H. Maurer, Jr. A Jury

trial resulted in verdicts finding each of the defendants guilty as charged in both counts of the Indictment. Their motions for a new trial were denied. Appellants Hazel, Cacio, Dempster, Dimitratos and Tucker were denied probation and sentenced to State prison. Probation was granted to appellant Osslo. The period of probation was ten years with the provisions that he be confined for the first six months of the probationary period in the Adult Detention Facility of San Diego county; that he pay a fine in the amount of $1,500 at the rate of $50.00 per month, from his own funds; that during the period of his probation he shall not hold any position, either elective or appointive, in, or receive any remuneration from, any union; that "this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case. Probation was granted to appellants McFaden and Meyer on similar conditions, except that in Meyer's case the period of confinement was set at three months and the fine imposed was $750.00. Each appellant appeals from the judgment of conviction and the order denying his motion for a new trial. Their contentions on appeal are that the evidence was insufficient; that the court erred in its rulings on the admission of evidence; that the indictment was defective as a matter of law; that the conduct of the deputy district attorney was prejudicial; that the punishment imposed as to appellants Osslo, McFaden and Meyer was improper; and that

appellants were denied a fair trial because the case was channeled into a particular court.

The record shows that a jurisdictional dispute arose in San Diego county between the local butchers' union and that of the retail clerks as to whether the butchers or the clerks would handle certain merchandise. Appellant Osslo was secretary-treasurer of the butchers' local and McFaden and Meyer were business agents for it. The other five appellants were or had been merchant seamen and all come from San Francisco to San Diego, ostensibly to accompany and protect the business agents of the San Diego butchers' local.

The five men from San Francisco arrived in San Diego a few days prior to October 22, 1955. They were in contact with appellants Osslo, McFaden and Meyer and attended a union meeting on October 21, 1955. On the following day, after being instructed by appellant Osslo, they accompanied McFaden and Meyer to various markets in San Diego, among which was Ferguson's Market in Chula Vista. They visited this market at about 11:00 a.m. where they conducted a "slow down" with the butchers there, and left. Appellants McFaden and Meyer, with appellants Tucker, Cacio, Dempster, Hazel and Dimitratos, returned to Ferguson's Market at about 1:00 p.m. The five last named men surrounded John Maurer, Jr., a retail clerk, struck and kicked him, left him lying on the floor and departed hastily from the market. They were arrested shortly thereafter and made false statements to the officers concerning the occurrence in the market and their business in San Diego.

Fifteen overt acts are alleged in the conspiracy charge and relate to conversations and meetings of the appellants and agreements for their compensation. The trial of the action consumed approximately 18 days and there are 2,369 pages in the reporter's transcript. A summary of the testimony of the many witnesses follows.

Appellant Osslo was secretary-treasurer of the Butchers' Union, Local 229, in San Diego. He was also president of the Western Federation of Butchers. Early in September, 1955, there was a strike of the butchers at the Food Basket Market in Pacific Beach. This strike lasted about a week. There were about twenty persons on strike and they reported daily to the butchers' union hall in San Diego. Appellant Osslo and the executive board gave notification for this strike. There had been a complaint of a contract violation in that some twenty three items containing meat and including "TV" precooked dinners were being handled in the grocery department. Following this strike, the market brought an injunction action against the butchers' local and it's officers, and after the injunction hearing, the disputed items were taken off sale. The contract which had been in effect at the Food Basket Market was up for renewal November 1, 1955.

About October 12, 1955, there was a strike of retail clerks at Ferguson's Market on El Cajon Boulevard. James R. Jackson, a business agent of butchers' union in San Diego, there observed three pickets carrying signs and about twenty-five other persons, including

a Mr. Marvin Brown and Mr. Herbert Langfeldt, business agents for the retail clerks, and possibly a Mr. Edgar Montgomery, Mr. Carroll Weathers and Mr. John Anderson. Jackson stayed in the area for several hours. Other members of the butchers' union, including appellant McFaden, were present, as well as two or three butchers who were employed at other markets. According to Jackson, in the late afternoon he was threatened by Brown and Langfeldt when they walked back in the alley and gave him a "good look". He also testified in this connection that before the 12th of October there was an arrangement that a certain number of butchers could be called together to the store where the strike was in progress. Jackson met appellants Dimitratos and Hazel at the butchers' hall on October 17, 1955. Prior to this date appellant Osslo had informed Jackson that Mr. Lundeberg, head of the Sailors' Union of the Pacific, with offices in San Francisco, was sending a couple of men down to San Diego to help the business agents, to go out with them and be their observers and see that they were not "jumped from behind". After appellants Hazel and Dimitratos met Jackson and others at the union headquarters on October 17, 1955, they went with Jackson and appellant Meyer to various stores and markets. They were checking contract violations at the markets as pointed out by Jackson and Meyer but their primary purpose was to protect the business agents and see that they were not "jumped".

At a union meeting on October 18, Dimitratos and Hazel were introduced to the membership and on the

following day they went with Jackson and Meyer to Trang's Market at Pacific Beach. Jackson understood that there was a dispute there regarding merchandise which should be in the meat department and was in the grocery department. When they entered the market, Jackson was told that the clerks were taking all of the red meat. Jackson construed this remark as a threat and reported it to McFaden, who in turn reported it to Osslo. Jackson noted, while in the market, that Mr. Butler a business agent for the retail clerks, was fumbling and handling a knife. While Jackson was at the market, Mr. Anderson, a business representative for the retail clerks, arrived and, according to Jackson, threatened him in "the way he carried himself".

Jackson testified that he understood that Osslo was contacted in Honolulu by McFaden, who asked for and received authorization to bring more men from San Francisco to San Diego; that these additional men were Tucker, Cacio, and Dempster; that they were hired and paid by the union at $150.00 per week and necessary expenses. They arrived in San Diego by plane October 19 or 20. Soon thereafter Osslo returned from Honolulu and on October 21 a meeting with the union membership was held in which the dispute was discussed and Osslo talked of a "slow down". At this meeting McFaden stated that Ferguson's Market, as well as others, was not cooperating with respect to frozen foods and a "slow down" would be effected the following day. Jackson was to contact either Mr. Lindville or Mr. Ferguson at this market.

On Saturday, October 22, at about 10:00 a.m., Jackson and his group left for Ferguson's market in two automobiles. One was a Ford, rented by the union, and the other was owned by Meyer. Dimitratos, Hazel, Cacio and McFaden were in the Ford, and Dempster, Tucker and Jackson were in the other car. The group arrived at Ferguson's at about 11:00 a.m. They inquired for Mr. Ferguson and Mr. Lindville and found they were not present. They then carried out a "slow down" in which most of the butchers went into the meat cutting room and remained there for 35 to 40 minutes. While this was going on, Jackson, McFaden, Dimitratos and Hazel were in the market and the others remained outside in the automobiles. The group then went to two markets in Chula Vista and there conducted a "slow down" in one of them. They then returned to Ferguson's at about 1:00 p.m. Jackson noticed two clerks' representatives leaning against a post near the stairway. These men were Montgomery and Maurer and they were pointed out to Jackson by Lindville, who was a member of the butchers' union and a partner of Ferguson in the market. About a minute after Jackson and McFaden entered the market, the other members of the group came in. As Jackson and McFaden were talking to Lindville, someone in the store shouted "fight!" and called for Lindville. Jackson did not see the fight but he saw Maurer on the floor, a number of people standing around, and Tucker and Cacio were walking away from Maurer. All of Jackson's group left the market within a minute or so and none

of them stopped to render aid to Maurer. Hazel, Cacio, Dempster, Dimitratos and Tucker left in the Ford and the rest of the group in the other car.

There is a conflict in the testimony as to the circumstances surrounding the assault on Maurer. There was testimony to the effect that at about 1:30 p.m. Montgomery, Leland Brooks and John Maurer went to Ferguson's Market with reference to an adjudgment with some of the employees. Brooks spoke with the bookkeeper in the office while Maurer and Montgomery stood in front of the stairway for about 10 minutes, and while standing there, they saw the butchers' representatives coming in the front door. McFaden was entering the store about 30 feet away and with him were about eight men. Montgomery and Maurer had been instructed by the secretary of the San Diego local to get away if any of the representatives of the butchers' local were present and, accordingly, they walked slowly toward the last check stand and the exit. As they turned toward the bakery counter, they were surrounded by Hazel, Cacio, Dempster, Dimitratos and Tucker. There had been no exchange of words between these five men and Maurer and Montgomery when they were surrounded. Some of the five appellants stomped on Maurer's foot and then on Montgomery's foot. Montgomery struck no blows and said nothing to appellants. He was aware that Maurer was struck in the stomach but did not see the blows. He saw Maurer fall forward. Montgomery then went upstairs to call the police and upon returning to the check stand, he saw Maurer lying

on the floor, writhing in pain. He was bleeding from the mouth and appeared to be having convulsions. He had a lump on the side of his face and his clothing was torn. The five appellants who had surrounded him had left the store.

Adeline Kann, a checker, testified that she observed Maurer walking away from the check stand in the direction of the exit and then a fight started; that she saw Tucker, Cacio and Dempster grab Maurer, holding his arms and beating him. They were hitting him in the back and neck and when Maurer finally went down, they kicked him hard several times.

Geraldine Walz, who was employed in the bakery section, testified that Maurer was standing, minding his own business, when he was attacked by at least three persons, Tucker, Cacio and Dempster. She did not see Hazel in the altercation directly but knew he was present when the beating was administered.

Maurer testified that he, with Brooks and Langfeldt, went to Ferguson's and went upstairs; that he and Montgomery then came down, looked at the butchers' counter and then went to the front of the store, where they were surrounded by a group of men; that someone in the group stepped on his foot and Dimitratos made a derogatory remark to him; that he was struck in the stomach, kicked about the head, stomach and back; that he tried to swing back and defend himself and that he hit Cacio in the stomach; that up to the time of the altercation he had done nothing at all except that he and Montgomery were trying to get to the check stand; that the reason he

did not get out of the store was because he was surrounded by the men and that Dimitratos was in front of them; that when they tried to go through the check stand, Dimitratos said something to him.

Herbert Langfeldt, an organizer for the retail clerks' union in San Diego, testified that he became aware of a strike at the Food Basket Market in Pacific Beach in September, 1955; that as a result of this strike, the clerks began to take "a sharper look" at what was happening with respect to a "jurisdictional steak"; that he contacted Osslo following the walkout at the Food Basket Market and there was a meeting with Osslo and local union representatives of the retail clerks held some time prior to October 8, 1955. McFaden, Meyer and Jackson were at this meeting; that Osslo there said that the butchers were going to "show us" and were going to handle the disputed merchandise; that Osslo pounded on his desk and stated that he was "top man" on the west coast and "that was it"; that as a result of the strike and this meeting, he (Langfeldt) and his colleagues alerted the secretaries of the retail clerks' unions of southern California and asked if they could send representatives to assist with respect to observing the markets and in helping to prepare a petition to the National Labor Relations Board; that on October 22 he went to Ferguson's Market to inform the management that a "slow down" had been ordered and to alert them to the situation and also to inform them that if there was anything the clerks' representatives could do for them, to let them know; that he arrived at Ferguson's at about 12:30 p.m.; that he, Maurer,

Montgomery and Brooks stopped at the liquor counter and spoke briefly to the clerk. The group then started up the stairway and Maurer and Montgomery went back down; that he noticed them moving toward the south exit and also observed a group of men coming into the market; that this group pursued Montgomery and Maurer and surrounded them; that he saw Montgomery jump through a group of customers and run to the back of the store and at the same time saw Cacio strike Maurer in the stomach; that Maurer was unable to get past the customers because of a railing and a number of shopping carts; that Maurer was pursued and "clobbered pretty heavily" until Dempster and Tucker got hold of him and rendered him helpless; tnat Dimitratos and Hazel attempted to get Montgomery but he got away; that they then started beating Maurer; that Maurer was "knocked into submission" quickly and dropped to the floor where he was kicked in the back and side; that appellants then left the market; that he saw Dimitratos strike Maurer 15 or 20 "judo chops" during the beating and also saw Hazel strike Maurer a number of times; that several days before, the retail clerks' representatives had received instructions to leave a store when members of the butchers' union arrived and that they had these instructions after they had heard through the "grapevine" that a "goon squad" had been ordered from San Francisco.

The appellants claim, in this connection, that the five men who came down from San Francisco were employed to protect the business agents of the butch-

ers' union in San Diego from intimidation by the members of the retail clerks' union. Dimitratos testified he undertook to have additional men brought down to San Diego besides himself and contacted Hazel following a telephone conversation on October 19 between McFaden and Ossio, who was then in Honolulu; that Hazel secured Dempster, Tucker and Cacio; that he, Hazel, Cacio, Dempster and Tucker attended the meeting of the butchers' union on the night of October 21, following a meeting with Osslo in which Osslo referred to instructions previously given by McFaden; that Osslo stated that the mere fact of the presence of Dimitratos and his group would avoid trouble and trouble was not wanted; that on October 22, when they went to Ferguson's Market the second time, he went over to the meat department; that Hazel went on back and Dempster, Cacio and Tucker were behind him; that he heard a big noise and walked on by and saw Cacio and Tucker walk out; that he did not see any altercation or fight and was nowhere near a fight.

Hazel testified that he belonged to the Sailors' Union; that he came to San Diego with Dimitratos and was to be paid $150.00 per week, plus expenses; that he went to the meetings at the butchers' hall on October 19 and 21 and went with the others to various markets; that on October 22 he went back to Ferguson's Market at about 1:00 P.M.; that Jackson, Meyer and McFaden walked into the store first; that he and Dimitratos followed with the rest of the men, or behind them; that he walked to the back of the store

and started talking to a Miss Healy and someone screamed "fight"; that he walked out of the front of the store and didn't see anything of the fight.

Appellants Osslo, McFaden, Meyer and Tucker did not testify at the trial.

Appellants Cacio, Dempster, Dimitratos and Tucker left Ferguson's Market together in the Ford automobile and were stopped by deputy sheriffs after a two mile pursuit. When questioned by the officers, Dempster stated he was down from San Francisco on a vacation and came down with a couple of friends, Tucker and Cacio. When asked if he was at Ferguson's Market the afternoon of the fight, he said that he was there but did not know anything about a fight; it was all a surprise to him. He testified that he attended a union meeting and denied that he had any connection with the butchers' union in the area. Tucker stated to the officers that he lived in San Francisco and that he came to San Diego with a friend (Cacio) to do some drinking and visit Tijuana. When asked if he had been to Ferguson's Market on the afternoon of October 22, what type of automobile he had gone in and with whom, he refused to make any statements about ~~these~~ matters and said he wanted to see an attorney first. Dimitratos stated to some of the officers that he had come down to San Diego with a friend (Hazel) for a little visit and vacation; that he had gone with some men from the butchers' union, including McFaden, to visit stores in the area; that on one occasion when they were at Tang's Market in Pacific Beach, eleven men from the

retail clerks' union showed up; that nothing happened; that they looked pretty tough and as he and the butchers' men were outnumbered, they left; that he rode to Ferguson's Market with McFaden, Dempster and Hazel; that they all went into the store together but that trouble began and they all turned around and left. Cacio told a police officer on October 22 that he had run into Dempster and Tucker in a bar in San Francisco and that they all decided to go to Tiajuana. When questioned about the fight at Ferguson's Market, he could remember vaguely being kicked or hit but could not remember hitting anyone. He denied knowing Jackson or McFaden or knowing anyone connected with the butchers' union. Hazel told one of the officers that he was a teamster employed in San Francisco, and that Dimitratos had asked him to come to San Diego on a vacation. He denied knowing anything about the fight at Ferguson's and stated that he went into the store and was talking to a girl and after a brief conversation with her, left the store.

The record further shows that the butchers' local in San Diego paid $4,500 bailbond premiums for Hazel, Cacio, Dempster, Dimitratos and Tucker; that they were paid a salary and expenses by the union and a defense fund was collected for them. Evidence was introduced showing that there were many telephone calls between the appellants and others involved in the labor dispute and that these calls were paid for by the butchers' union.

The first contention presented by appellants is that the verdict and the judgment are not sustained by

the evidence; and that the verdict and judgment are contrary to the evidence and the law. Appellants admit that Osslo had a conversation with Lundeberg; that Dimitratos and Hazel met in San Diego; that McFaden made reservations at the U. S. Grant Hotel in San Diego at Osslo's request; that McFaden, Dimitratos and Hazel met at the U. S. Grant Hotel on or about October 15, 1955; that Dimitratos, and Hazel met at the butchers' local on October 17; that Dimitratos, Hazel, Meyer and representatives of the butchers' local No. 229 met at Tang's Market on or about October 18th; that Dempster, Cacio and Tucker met in San Diego on or about October 21; that Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 21, 1955, met at the Ace Motel in San Diego; that Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 22, accompanied defendants McFaden and Meyer to Ferguson's Market; that defendants Dempster, Cacio, Tucker, Dimitratos and Hazel, on or about October 22, were in a Ford sedan in San Diego and that the car was leased by butchers' local No. 229, all as alleged in overt acts 1 to 10, inclusive, of the Indictment. Appellants do not deny that Osslo and McFaden agreed to pay Dimitratos, Hazel, Tucker, Dempster and Cacio a weekly salary and expenses as stated in overt acts 11 to 15, inclusive, of the Indictment. While appellants admit the overt acts alleged, they claim that these acts cannot be sustained as acts "in furtherance of a conspiracy to commit an assault as alleged" and that there is no evidence to justify the inference that any assault or

engagement of men was due to a plan or plot or design to do anything illegal or improper at any place or at any time. We are not in accord with this contention.

Overt acts need not be in themselves criminal in nature so long as they are done in pursuance of the conspiracy. Nor is it necessary that the purpose of the conspiracy be fully accomplished or that each conspirator commits an overt act in carrying out the purpose of the conspiracy, for all the members thereof are bound by all acts of all members done in furtherance of the agreed plot. (People v. Robinson, 43 Cal. 2d 132, 139, 140.) And as is said in that case at page 136: "A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design." In the instant case the evidence was sufficient to warrant the jury's inference that a plan and agreement existed between the appellants to commit an assault and that the overt acts performed by them were in accordance with and in furtherance of their unlawful plan and agreement.

The witness Langfeldt testified that at a meeting prior to October 8, 1955, attended by McFaden, Meyer and union representatives, Osslo stated that the butchers were going to "show us" and were going to handle the disputed merchandise; that Osslo pounded on his desk and said that he was "top man" on the west coast and "that was it". Apparently, the two unions involved were unable to settle their dispute

amicably and the jury could reasonably infer from the acts and conduct of Osslo and McFaden that they intended to use other than peaceful means to accomplish the purpose of having the butchers handle the disputed merchandise; that Osslo, McFaden and Meyer procured the services of the five sailor appellants for the purpose of intimidating the retail clerks by their appearance and if this was not sufficient, to use force and violence. In this connection it should be noted that no effort was made to employ local union men to accompany the butchers representatives on their visits to various markets. If the purpose of the appellants was to protect such representatives and keep them from being "jumped" and to act as observers, it is apparent that this could well have been accomplished by other means than the importation of the five members of the Sailors' Union from San Francisco. It may also be observed in this connection that when the five sailors were taken into custody by the officers they did not state that their purpose in coming to San Diego was to act as observers but claimed that they were on vacations.

There was evidence that some of the butchers' representatives thought they had been threatened by members of the retail clerks' union. In one instance the claimed threat consisted of a "good look", another by the way in which a business representative for the clerks "carried himself", and the other where a representative of the clerks was "fumbling and handling a knife". The jury could reasonably determine that these circumstances were not sufficient to justify the

hiring of the five appellant sailors from San Francisco.

There is evidence in the record from which the jury could find that the five sailors, with appellant McFaden and under the direction of appellant Osslo, entered Ferguson's Market together and almost immediately surrounded Montgomery and Maurer, who were pointed out to them as representatives of the retail clerks; that the assault on Maurer was unprovoked and was unnecessary to accomplish the claimed purpose of the appellants in entering the market. The evidence further shows that the five appellants fled from the scene and left Maurer lying on the floor. It further appears that the five appellants were paid by the butchers' union, a defense fund was collected for them and their bailbond premiums were paid by the butchers' local.

It is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. (People v. Mazza, 135 Cal. App. 2d 587, 596.) Viewing the entire

record before us in accordance with these rules, we conclude that the verdict and judgment are sustained by the evidence.

It is next considered that the court erred in admitting the testimony of Capt. Hodson and Robert Frediana (Chief Ship's Clerk, United States Coast Guard) as to entries in log books of steamships showing that Dimitratos and other appellants in 1951 and 1952 were involved in altercations on board ship. The attorney general contends that this evidence was admissible under the case of People v. Sykes, 44 Cal. 2d 166, 170, where it is said:

> ". . . The test for admissibility is: 'does it tend logically, naturally, and by reasonable inference, to establish any fact material for the people, or to overcome any material matter sought to be proved by the defense? If it does, then it is admissible, whether it embraces the commission of another crime or does not, whether the other crime be similar in kind or not, whether it be part of a single design or not.' "

The court admitted this evidence as applying to the conspiracy count only and so instructed the jury. Furthermore, defense counsel, on direct examination of the witness Dimitratos, introduced evidence in detail as to the instances referred to in the log books. Under the circumstances shown, we conclude that there was no reversible error in this connection.

Appellants complain of the admission of testimony relating to a Wall Street strike, a strike in Oakland, and a Western Union strike, which testimony tended

to show the involvement of members of the Sailors' Union of the Pacific, of which Mr. Lundeberg was the head, in labor disputes with which said union was not directly concerned. The admissibility of this testimony may well be questioned. However, under the rule announced in People v. Sykes, supra, and the circumstances of this particular case, we cannot hold as a matter of law that the error, if any, was sufficient to justify a reversal of the judgments.

The claim is made that the court improperly admitted the testimony of a Mr. Hewlett, an official of the telephone company, indicating telephone calls between some of the defendants and the organizations to which they belonged. This testimony was relevant to show the connection between the various appellants as a circumstance indicating that the persons involved were a part of the conspiracy and acting in concert. (People v. Griffin, 98 Cal. App. 2d 1, 34-38.)

It is argued that the court erred in permitting the testimony of Capt. Roland to be presented; that this testimony related to the arrest of one Carroll Weathers after the incident of October 22, after the alleged conspiracy had ended, and was therefore inadmissible. However, this evidence was relevant as an indication that the appellants were attempting to show a justification for their conduct and to impede an investigation. It was, therefore, not prejudicially erroneous. (People v. Timmin, 136 Cal. App. 301, 306.)

Appellants claim that the court erred in refusing to permit witness Jackson to testify as to reports made to Osslo, which caused him (Osslo) to telephone

to Lundeberg in San Francisco for men to go with his business agents on their visits to stores in San Diego. An offer of proof was made by the defense that the witness would testify that McFaden related his experiences to Osslo and that McFaden had stated that he believed his life was in danger. No prejudicial error is indicated in this connection. (People v. Monson, 102 Cal. App. 2d 308, 313.)

Appellants next contend that as a matter of law the Indictment charging "conspiracy to commit the crime of assault, 182 Penal Code" did not charge a crime known to or punishable under the laws of this state. This contention is without merit. Section 182, subdivision 1, of the Penal Code provides various punishments if two or more persons conspire among other things, "to commit any crime". Among the penal paragraphs it provides that when said persons "conspire to commit any crime against the person of any official specified in subdivision 6, they are guilty of a felony and are punishable by imprisonment in the state prison for not less than 10 years. When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of the said felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit such felony shall be that prescribed for the lesser degree, except in

the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree. If the felony is conspiracy to commit two or more felonies which have different punishments and the commission of such felonies constitute but one offense of conspiracy, the penalty shall be that prescribed for the felony which has the greater maximum term." Appellants contend that while subdivision 1 of Penal Code Section 182 refers to the commission of "any crime" and while such phrase, taken alone, is broad enough to include a misdemeanor assault, this does not mean that it is "described" as required by the final paragraph concerning punishments in said section and that, consequently, no crime was charged in count one of the Indictment.

In Doble v. Superior Court, 197 Cal. 556, 566-567, the court, in discussing the meaning of "any crime", as used in the statute, said:

> "This latter penal paragraph commences 'When they conspire to do *any of the other acts* described in this section.' The quoted words are sufficiently broad to include within the purview of the paragraph *all* of the offenses created by the *five* subdivisions of the section and for which no penalty is imposed by the first penal paragraph. That is to say, the words 'any of the other acts described in this section' were meant to, and do in fact, include all other conspiracies to commit crimes or acts prohibited by the section regardless of whether they are denounced by subdivision 1 or any other subdivision thereof. Therefore, in this second penal paragraph we find the penalty that is to be imposed upon those conspiring to commit

any of the crimes or acts denounced by subdivisions 2, 3 and 4 and that which is to be imposed for a conspiracy to commit any and all misdemeanors, whether defined by the Penal Code or by any other statute, and for conspiracies to commit all felonies which are defined and penalized by some law *other than the Penal Code*. In other words, the second penal paragraph in addition to prescribing the punishment for conspiracies to commit the crimes or acts specified in subdivisions 2, 3 and 4 of the section, also prescribed the punishment for all offenses denounced by subdivision 1 and for which the first penal paragraph does not prescribe a punishment—namely, conspiracies to commit any and all misdemeanors, not included in those enumerated in subdiv. 5, and conspiracies to commit all felonies prescribed by some general law of the state other than the Penal Code."

As is said in People v. Buffum, 40 Cal. 2d 709, 715:

"A conspiracy may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement."

In People v. Cossey, 97 Cal. App. 2d 101, 112, it was held that the superior court possessed jurisdiction to try the defendant for conspiracy to commit the crime of petty theft.

The next contention is that the misconduct of the district attorney was highly prejudicial and resulted in a miscarriage of justice. Appellants devote many pages of the opening brief to comments made by the district attorney and questions put by him to various

witnesses. In many of the instances related, objections to the questions asked and statements made were sustained by the court. The jury was instructed, both at the beginning and end of the trial, to disregard any stricken evidence; that the argument of counsel was not evidence; that if any counsel intimated by any of his questions that certain hinted facts were or were not true, that they must disregard any such intimation and must not draw any inference from it; that as to any statements made by counsel in their presence concerning the facts of the case they must not regard such statements as evidence; that they were the exclusive judges of the facts and their effect and value on the evidence. In his opening statement to the jury the deputy district attorney stated that what he was about to say was neither evidence nor an argument. He stated that if in any way the jury's version of the evidence was different from his, the jury should take its own version. We have examined the many specifications of alleged misconduct and conclude that under the circumstances there was no prejudicial error in this connection.

Appellants Osslo, McFaden and Meyer contend that the punishment imposed as to each of them is improper and constitutes a cruel and unusual punishment; that they were each convicted of a misdemeanor only, in that the court imposed no term of imprisonment in the state prison; that it was neither a suspension of imposition of a sentence nor execution of a sentence and that, consequently, the proposed term should be considered void and that the probationary

terms were unduly severe. The record shows that the appellants applied for probation; that following the denial of their motions for new trial and the pronouncement of judgment as to the five sailor appellants, the court stated that he was going to grant probation to Ossle, McFaden and Meyer. Separate probationary orders were made as to each of said appellants. In In re Hays, 120 Cal. App. 2d 308, 310, the nature of probationary procedure was discussed and the court there said:

> "The general nature of the entire probationary procedure is likewise well settled. As said in In re Martin, 82 Cal. App. 2d 16, 22; 186 P. 2d 645, 'An order placing a defendant on probation, even though it include as a condition a period of detention, in the county jail, is not a *judgment and sentence.*' There is no finality to an order for probation; it imposes no penalties but is 'an act of clemency.' A defendant has the undoubted right to refuse probation—a necessary safeguard against the possibility that probationary conditions may be more onerous than sentence. (People v. Frank, 94 Cal.App.2d 740, 742; 211 P.2d 350, citing People v. Billingsley, 59 Cal.App.2d Supp. 845, etc.; 139 P.2d 362.)"

Each appellant was found guilty of assault as specified in Penal Code, sec. 245, for which the maximum punishment is imprisonment in the state prison not exceeding ten years. Each fine imposed is less than the $5,000 maximum specified in Penal Code, sec. 245, and sec. 182 under which the appellants were also found guilty. It therefore appears that the periods

of probation and of detention were not in excess of the periods specified in sec. 1203.1 of the Penal Code.

The granting or withholding of probation is a matter that rests entirely in the sound discretion of the trial court (People v. Blankenship, 16 Cal. App. 2d 606, 610), and the only right which an applicant for probation possesses is that his petition shall receive consideration by the court. (People v. Frank, 94 Cal. App. 2d 740.) It does not appear that the appellants were convicted merely of misdemeanors. A crime such as specified in sec. 245 of the Penal Code and the applicable part of sec. 182 thereof is a felony, unless the trial court exercises its discretion and imposes a county jail sentence or fine. (People v. Williams, 27 Cal. 2d 220, 228-299.) In the instant case sentence was suspended by placing the appellants on probation.

Finally, appellants contend that they were denied a fair trial because the case was "intentionally channeled" into a particular court for trial. However, they do not claim that they were denied their rights to a speedy trial in the sense that the case was not set for trial within the time limits set in sections 1050 and 1382 of the Penal Code. The record shows that there were numerous delays and continuances of the trial which were occasioned by the business of the court. No abuse of discretion appears in this connection.

An examination of the entire record in this case leads us to the conclusion that there were no errors

herein resulting in a "miscarriage of justice" within the meaning of that phrase as determined in People v. Watson, 46 Cal. 2d 818, 835.

The judgments and orders denying motions for new trial are affirmed.

Mussell, J.

We concur:

Barnard, P. J.,

Griffin, J.

Filed May 23, 1957,
E. J. Verdeckberg, Clerk.

Appendix C

(Vol. 50 A.C. 1.)

In the Supreme Court of the State of California

Criminal No. 6127

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
MAX OSSLO, JOSEPH McFADEN, ARTHUR MEYER, CHESTER D. HAZEL, LOUIS J. CACIO, PAUL E. DEMPSTER, JERRY L. DIMITRATOS and CHARLES A. TUCKER,
Defendants and Appellants.

MAJORITY OPINION

Defendants were charged with (count I) "Conspiracy to Commit the Crime of Assault (PC 182)" and (count II) "Assault by Means of Force Likely to Produce Great Bodily Injury (PC 245)." A jury found them guilty as charged. Imposition of sentence upon defendants Osslo, McFaden, and Meyer was suspended and they were granted probation. Judgments of conviction were entered against defendants Hazel, Cacio, Dempster, Dimitratos, and Tucker. Defendants' motion for new trial was denied. Defend-

ants appeal, respectively, from the probation orders and judgments, and from the order denying their motion for new trial. They present a multifold attack upon the orders and judgments. Defendants urge that the evidence is insufficient; that there was prejudicial error in the admission and exclusion of evidence; that the charge of conspiracy to commit the crime of assault is not a charge of a crime known to the laws of this state; that there was prejudicial misconduct of the prosecuting attorney; that the punishment imposed upon defendants Osslo, McFaden and Meyer is improper and excessive; and that the case was erroneously channeled into a particular department of the superior court. For the reasons developed in the ensuing discussion we have concluded that these contentions are without substantial merit except that one of the terms, hereinafter described, of the orders granting probation to Osslo, McFaden, and Meyer is erroneous, and that the orders should be modified by striking out the erroneous provision.

The conduct and incidents involved in this prosecution arose out of a jurisdictional dispute in San Diego County between the local Butchers' Union and the local Retail Clerks' Union. Preceding this dispute members of the Clerks' Union employed in markets which stocked frozen and packaged dinners had handled the sale of such dinners. The Butchers' Union determined that its members rather than members of the Clerks' Union should have the handling of the frozen dinners which included a meat or poultry serving, and demanded that the markets govern their em-

ployes accordingly. The Butchers claimed "violation of contract" by the markets permitting Clerks to continue handling the dinner items and called a strike at one of the markets.

The Clerks endeavored to have the dispute settled through legal proceedings. About October 5, 1955, the secretary-treasurer of the Clerks' local wrote "to the market operators informing them of the jurisdictional dispute and the stand the Clerks were taking." Representatives of the Butchers and the Clerks met a few days prior to October 12 (according to one witness, prior to October 8). The secretary-treasurer of the Clerks' local "made demand upon Mr. Osslo [who held various offices, hereinafter detailed, with the Butchers] to cause to have the merchandise in dispute at Ferguson's market, as an example, placed back under the jurisdiction of the Clerks, or our organization would take *every legal means* necessary to enforce the jurisdiction." (Italics added.) Osslo "pounded the table three times, stated he was boss of the West Coast and he would fight for jurisdiction."

On October 18, 1955, four days before the assault of which defendants stand convicted, the Clerks filed with the National Labor Relations Board a petition "for the purpose of having the Board determine who the jurisdiction belonged to."

In contrast to the efforts of the Clerks to settle the controversy by legal proceedings, and inferentially to carry out the declaration of Osslo that "he was boss of the West Coast and he would fight for jurisdiction," the Butchers, assertedly for the purpose of

providing "observers" to accompany Butchers' representatives and assist in "inspecting" markets which were permitting, or suspected of permitting, grocery clerks to sell the packaged foods, imported defendants Hazel, Cacio, Dempster, Dimitratos, and Tucker, hereinafter sometimes called the sailor defendants, from San Francisco and started calling on the markets.[1] The hereinafter described brutal assault and battery upon Maurer, a business agent for the local Retail Clerks, followed.

The evidence, pertinent portions of which are hereinafter summarized or quoted, is in some respects substantially conflicting, but in every respect is ample to support the verdicts. If the jury believed the prosecution witnesses and disbelieved the testimonies of those defendants who took the stand, they properly could have felt that the cumulative effect of the evidence was not only sufficient, but overwhelming. Study of the record constrains us to conclude that the latter view is correct. "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the

[1]The Clerks, too, had persons from elsewhere than San Diego assisting them in connection with the jurisdictional dispute, but they were members of the Retail Clerks' Union and they did not become involved in violence. "They accompanied the local business agents here on field trips to observe where the merchandise was located in the markets that was in dispute and to assist in making diagrams of the stores, also to assist the local men in getting petitions signed to submit to the National Labor Relations Board."

weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. . . . We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury." (*People v. Daugherty* (1953), 40 Cal.2d 876, 885 [256 P.2d 911].)

Defendants' contentions require a rather extensive review of the evidence in order that they may be viewed and resolved in fair perspective to the entire case.

The Evidence. James Ray Jackson, a business agent for the Butchers, testified for the prosecution as a rather reluctant witness. His testimony, read as a whole, and in the light of the entire record, leads

inevitably to the inference that the sailor defendants, Dimitratos, Cacio, Tucker, Dempster, and Hazel, who were neither members of the Butchers' Union nor residents of San Diego, were employed by the Butchers with the expectation that they would engage in acts of violence, although in terms Jackson insisted that they were employed merely as "observers." The substance of Jackson's testimony is as follows:

Jackson's duties as business manager were "to sign contracts, work on grievances, check violations" and "I do organizing . . . and any other work that is necessary to do." During the 18 years Jackson had been a member of the Butchers, defendant Osslo had been secretary-treasurer of the San Diego local to which Jackson belonged. Osslo was president of the Western Federation of Butchers, the affiliated butchers' unions of California, and a member of the board and executive committee of the International Butchers' Union at the time of the assault and battery (October 22, 1955). In June, 1956, Osslo was elected vice president of the International. Membership in the Butchers in the United States was about 300,000. Defendant McFaden had been a business agent of the San Diego local since 1941 and defendant Meyer had been a business agent since 1955.

About September 8, 1955, there was a strike of the Butchers at the Food Basket Market because of an asserted "violation of contract" in that certain prepared and packaged complete dinners included meat items and such packages were being handled by the Clerks in the grocery department rather than by the

Butchers. As a result of the strike the Food Basket Market brought an injunction suit against the San Diego local of the Butchers. The court ordered that the disputed prepared dinners be taken off sale. It may be inferred that a purpose of the order was the prevention of the sort of violent altercation which, as hereinafter related, forms the basis of defendants' conviction of assault.

Concerning the relations between the Clerks and the Butchers at the time of the Food Basket strike, Jackson testified as follows:

"Q. Now at Food Basket, . . . did you talk with the Clerks representative while you were on strike at Food Basket, by any chance? A. Yeah, I guess we did. General conversation. . . .

"Q. Let me ask you this: Were you present at any conferences at which any of the Clerks representatives discussed the Food Basket situation with Mr. Osslo? A. Sir, I had my foot broken the day before anything like that was discussed, I believe. . . .

"Q. Do you, of your own knowledge, know whether or not any discussions were held between Mr. Osslo and representatives of the Retail Clerks Union? A. When?

"Q. After and at about the time of the Food Basket incident. A. No sir. . . . I don't know. . . .

"Q. Now when was the contract that was in effect at Food Basket up for renewal? A. November. . . .

"Q. Yes. Now what are your functions as a business agent; just what do you do? A. My duties are to get—to sign contracts, work on grievances, check

violations. . . . I do organizing work on grievances, sign contracts, and any other work that is necessary to do."

On October 12, 1955 (a Wednesday), the Clerks struck Ferguson's Market. Jackson and McFaden went to the market. Approximately 25 clerks were present, among them Mr. Montgomery, hereinafter mentioned as one who was attacked but succeeded in escaping serious injury in the subsequent assault of October 22, 1955. In addition to the members of the Butchers who worked at the market, defendant McFaden, and Jackson, two or three other members of the Butchers' Union were present. The Clerks "gave us [the Butchers] some pretty good looks." Jackson felt that these "looks" were threatening.

Discussions were had by the Butchers as to what they would do at stores where the Clerks walked out. Defendant Osslo was present at these discussions.

Sailors Dimitratos and Hazel arrived in San Diego by airline from San Francisco on Saturday, October 15, 1955. On the following Monday they met with defendants McFaden and Meyer and the witness Jackson. Defendant Osslo had previously stated that Harry Lundeberg "was sending a couple of fellows down to help us out, go with us, be our observers, and see that we weren't jumped from behind, or bothered." "[T]hey were to accompany us and work with us." There were older, unemployed members of the Butchers who could have acted as observers but they were not called upon to do so. The sailors "were going to observe and——

"Q. Observe what? A. Observe what was going on.

"Q. What were they to do after they observed what was going on? A. To protect us and see that nobody created any trouble or violence or anything of that sort."

The witness did not call the police for protection; he did not know whether anyone else had done so.

"Q. Were the men from San Francisco, the sailors, more proficient, to your knowledge, than the San Diego Police Department? A. Well, I don't know. Maybe they might be for labor work. They know what to look for.

"Q. You mean that they are experienced in this type of an action, or this matter? A. What action are you talking about, sir?

"Q. Well, in coming down and being observers. You mean they were more experienced in that line of work? A. I believe they would be.

"Q. Than a police officer might be? A. I believe they would be, yes.

"Q. In what respect would they be more proficient? A. They worked in labor for a good many years. That is their job, working as laboring people.

"Q. What are they going to observe? I am kind of interested in that. What are they going to observe that an older dues paying member [of the Butchers] couldn't observe? A. They could observe what goes on.

"Q. I see. In other words, what that takes is a good pair of eyes? A. It takes a little brains, too.

"Q. Well, a man that has been a master craftsman and worked up to a head meat cutter would have those qualifications, wouldn't he? A. Some might. Most of them might.

"Q. What were they to do after they observed? Were they to make any reports? A. Yeah.

"Q. To whom were they to report? A. I guess they would make them to our Secretary?

"Q. Mr. Osslo? A. And to the Western Federation of Butchers or the State Federation of Labor. . . .

"Q. What are you looking for to observe? I am not clear on that or on these reports. Did they make any reports, let me ask you that? A. They reported on what they knew and saw.

"Q. They were oral reports, were they? A. Yes.

"Q. How often did they make the reports? A. I guess daily. . . .

"Q. What I am interested in, Mr. Jackson, is this: . . . why if you are looking for just observers to go around and find out what is going on, didn't you give any preferential treatment to the local people in San Diego in other unions? A. Well, sir, not that I know of.

"Q. Here is what I want to know: why is the Sailors Union selected as the ones you are going to go to to get observers? A. Well, I would assume that the reason is—I don't know for sure—these fellows are out on a ship and they come back in and they have got time on their hands waiting around for another ship.

"Q. Did you check any other labor hiring halls here in town, the laborers union, the plasterers union, or—— A. I didn't.

"Q. Do you know whether or not anybody else checked any of the other labor hiring halls locally to see if there were any people available that could be employed as observers? A. I don't know, sir.

"Q. To your knowledge was that done? A. No, sir."

"[W]e had told the other labor organizations in San Diego what was going on. Indirectly that is asking for help and aid. As far as specifically asking for the loaning of a man or two men or more, I don't know of that being done, sir."

"Q. What did Mr. Osslo say about the two men that were coming down, if anything? . . . A. He said they were coming down to go around with us. . . .

"Q. What did you do when you went around to these stores and what did they do to earn this $150.00 a week plus expenses [the amount which the sailors were paid by the Butchers]? A. They were with us. . . .

"Q. Tell me what the work was they were doing? A. Checked the markets.

"Q. What do you do when you check a market? How did they know about a violation? They are sailors, aren't they? A. They know what they are looking for.

"Q. What were they looking for? A. A violation of our contract in the meat department.

"Q. How did they know a violation of a contract if they just flew in from San Francisco and had a short meeting with you? Is it that easy that you can become a business agent? A. As I said before, . . . they were here to go with us, act as observers and to protect us in case there might be any violence. . . .

"Q. If there was a contract violation. How would they know what the contract was? A. We would have to tell them.

"Q. You would have to tell them what was in your contract? A. Point out the items, if there is a violation on the items.

"Q. These men are sailors and here is what I am confused about, and I would think an old timer in the meat business would have been important to you. What instructions did you give these men from San Francisco that made them proficient in a short period of time to be able to observe these contract violations, if there were any? A. The violations part of it wasn't necessarily their objective to observe. They were sent down here or called down here, to protect us, as I said before, and see we weren't jumped from behind, or jumped at all.

"Q. And the services of the San Diego Police Department, which are free, weren't ever used in that respect? . . . A. I did not call the police department, no, sir. . . .

"Q. Were you in any way threatened? A. By certain gestures, yes, sir.

"Q. When were you threatened by certain gestures? A. At Tang's Market.

"Q. That is after Dimitratos and Hazel are with you, isn't it? A. Yes, sir.

"Q. I am talking about before, before these men are hired what gestures were made that caused you personally to feel that you had been threatened. A. The incident at Ferguson's. . . . I was in the alley between the truck and the building when several of them walked back. . . .

"Q. What did they do? A. Actually nothing but give us a good look. . . .

"Q. That scared you? A. It could have been a threatening look, yes, sir. . . .

"Q. Well, who did you report the threatening looks you got in the alley way at Ferguson's to? A. I believe they were all reported to each other, Brother Ossio, myself and Mack and Brother Meyer.

"Q. Did you ever report those threatening looks to the police department? A. I did not, no, sir.

"Q. As a matter of fact, you weren't even concerned with them, were you? A. Well, no, sir. . . . [After the question was read and reread] I was concerned. . . .

"Q. You didn't report it to the police? A. There is not much to report, sir."

"Q. . . . In the particular market how would they [Dimitratos and Hazel] know [which items were to be handled by the Butchers], just walking into the place? A. They wouldn't necessarily. They were with me or some of the rest of us. . . ."

McFaden arranged for hotel reservations for Dimitratos and Hazel and a few days later, when the additional three sailor defendants (Cacio, Tucker and Dempster) were imported from San Francisco, arranged for their reservations:

The sailor defendants each received $150 a week plus airline transportation, hotel accommodations and expenses from the Butchers. The salary of a beginning apprentice butcher was $72 a week. The "top rate" which a journeyman butcher was paid was $102

a week. A head meat cutter received $107 a week. Jackson, as business agent, received $140 a week.

Dimitratos and Hazel attended union meetings of the Butchers. Such meetings were not open to the public but "We have visitors. Anyone working for the organization is permitted," and frequently visitors not connected with the union were invited.

At Tang's (sometimes called Ming's) Market a representative of the Clerks assertedly threatened the witness Jackson by telling him that the Clerks "were taking everything that bleeds, all the red meat, everything. That is not only a threat to me, that is a threat on the organization, the way I took it. . . .

"Q. Did you report it to the police department? A. No, sir.

"Q. Did you report it to Mr. Osslo? A. Yes, sir. . . . I reported to McFaden and he, in turn, reported it, and Mr. Dimitratos and Mr. Hazel were there."

At Tang's Market one Butler, a Clerk, assertedly "displayed" a knife. Counsel asked:

"Q. Now was there any display of a knife? A. Yes, sir. . . .

"Q. And what was Butler doing with the knife? A. Playing with it, fumbling it, handling it . . . he [was] cleaning his fingernails with it . . .

"Q. What did Butler do with the knife when you came over . . . and were introduced to him? A. He didn't have the knife in his hand at that time, sir." He had been "say twelve to fifteen feet" away when the witness saw him with the knife. Mr. Anderson, another representative of the Clerks, "came storming

in," according to the testimony of Dimitratos; the bulge of a gun was visible "On his left arm pit up in the shoulder . . . You could just about see the shape of it." But apparently no one claimed to have actually seen a gun. The testimony of Mr. Jackson continues:

"Q. Did Mr. Anderson threaten you at all? A. Only in a way that he carried himself.

"Q. How did he carry himself? A. Pushed his way through . . . the crowd, through the store.

"Q. Who did he push? A. He didn't push anyone. I say pushed his way through."

When Jackson's recollection was refreshed he admitted that he had testified before the grand jury that at Tang's no threats were made to him or in his presence.

After the incidents at Tang's Market, defendants Cacio, Tucker, and Dempster were also hired by the Butchers and brought from San Francisco to San Diego.

At about 11 o'clock on the morning of October 22 the five sailor defendants together with McFaden, Meyer, Jackson, and one Woodard, an International representative of the Butchers, went to Ferguson's Market. This was the first occasion that Cacio, Dempster, and Tucker went out with the Butchers. There was a slowdown in the meat department for about 40 minutes. Ferguson's was said to be "one of the sensitive points" in the jurisdictional dispute. The group of Butchers' representatives accompanied by their five sailor employes then went to two other

markets, in each of which they remained only a few minutes. The sailors assertedly were present "as observers, witnesses, whatever you want to call it." The group returned to Ferguson's Market and "started a conversation" with one of the proprietors. Standing in the market were Montgomery and Maurer. The proprietor pointed out Montgomery and Maurer as Clerks.

The testimony of various witnesses as to how many of the sailors actively participated in the ensuing assault and battery is conflicting. However, the following direct evidence supports a determination that all five of the sailor defendants actively participated: These five defendants surrounded Clerks Montgomery and Maurer and some of the defendants stomped on Montgomery's and Maurer's feet. "Dimitratos and Hazel attempt[ed] to get Montgomery, but he . . . [though pursued] got away and they stepped right back out . . . Maurer couldn't get . . . past the customers because of a railing and a bunch of push-carts . . . and he was being pursued . . . until two men got hold of him and held him . . ." Cacio struck Maurer in the stomach. Dempster and Tucker pinned Maurer's arms to his sides. "Dimitratos judo chopped him terribly, fifteen or twenty shots," and "Hazel was bombing in with his fists and with judo chops." Maurer was beaten and kicked. "[W]hen they let go and dropped him to the floor he was in kind of a hulk lying on his side. That is when Cacio used the boots on him. . . . Kicked him in the back twice and then he flopped over on his back and he was kicked, I think, right in the side terribly hard." The

witness then "Checked to see if the police were called, checked to see if the ambulance had been called."

Defendants' argument that there is no "credible" evidence that Dempster, Dimitratos, and Hazel participated in the assault is obviously completely devoid of merit when presented to a reviewing court. Such argument goes to the weight of the evidence, and resolution of the conflicting evidence is for the trier of fact. (*People v. Daugherty* (1953), *supra*, 40 Cal.2d 876, 885.)

McFaden, Meyer, Jackson, Woodard, and the five sailor defendants had gone to Ferguson's Market in two cars; some of the Butchers and some of the sailors were in each car. When they fled from the market after the assault and battery, the sailors left in one car and the Butchers left in the other car.

A cashier at the market had obtained the license number of the car in which the sailors fled. A boy also attempted to write down the license number but one of the defendants snatched it from the boy's hand. Police officers, immediately notified of the license number, stopped the car, arrested the sailors, took them to the police station, and questioned them.

Defendant Dempster stated to the police that although he had been at Ferguson's market he knew nothing about a fight there. He also falsely denied that he had any connection with the Butchers. He stated that he had come from San Francisco on a vacation.

Defendant Tucker at first refused to answer police questions about whether he had been at Ferguson's

Market. He stated that he had come to San Diego to do some drinking and to visit Tia Juana. In a subsequent conversation with the police Tucker stated that he had been at Ferguson's Market and that there had been a fight but denied that he or his friends were involved in the fight. He also falsely denied that the Butchers had hired him.

Defendant Dimitratos stated to the officers that he had come to San Diego for a vacation; that neither he nor the group he was with were involved in the fight to his knowledge. On the witness stand he admitted prior conviction of felony and that he made false statements to the officers.

Defendant Cacio told the officers that he had been drinking; that he vaguely remembered being hit or kicked, but that he did not remember hitting anyone. He denied knowing who Jackson and defendant McFaden were and also falsely denied that he was employed by the Butchers.

Defendant Hazel told the officers that he was in San Diego on a vacation and had no interest in unions; that he and defendant Dempster had gone into Ferguson's Market to buy cough drops; that he knew nothing of any fight; and that he did not know McFaden or Jackson.

On November 27, 1955, defendant Meyer told a police officer that he had not been at Ferguson's Market on October 22.

The foregoing statements of defendants to the officers concerned matters which were within the defendants' own knowledge, they related materially to

the issue of their guilt or innocence of the offenses of which they now stand convicted, and they were manifestly false through deliberate and willful intent. Such falsifications cogently evidence consciousness of guilt and suggest that there is no honest explanation for incriminating circumstances, and thus are admissions of guilt. (*People v. Darrow* (1931), 212 Cal. 167, 177 [1] [298 P. 1]; *People v. Tolson* (1952), 109 Cal.App.2d 579, 581 [2] [241 P.2d 32]; *People v. Farrell* (1951), 107 Cal.App.2d 25, 29 [2] [236 P.2d 424]; see also *People v. Wayne* (1953), 41 Cal.2d 814, 822-823 [4, 5] [264 P.2d 547]; concurring opinion of Mr. Justice Traynor in *People v. Albertson* (1944), 23 Cal. 2d 550, 581-582 [147 P.2d 7].)

At the trial defendants Hazel, Dimitratos, Cacio, and Dempster testified. Defendants Ossio, McFaden, Meyer, and Tucker did not take the stand.

The Butchers paid bail bond fees of $4,500 for the sailor defendants. They paid $10,000 to a private investigator for an investigation of this matter.

It must be borne in mind that the jurors not only heard the evidence which has been summarized but also had the benefit of observing the defendants and the witnesses from day to day during the trial, and that the record shows the receipt in evidence of 59 exhibits. These exhibits include pictures of the scene of the assault, records of telephone calls among the defendants, and records of expenditures of the Butchers on behalf of and to the sailor defendants.

Defendants do not dispute that the overt acts charged in the conspiracy count of the indictment

were proved.[2] But they urge that it does not appear that these overt acts were a part of a conspiracy. It is true that there is no *direct* evidence of a conspiracy; all the direct evidence bearing on the question is to the effect that the defendants who actually participated in the assault and battery had been instructed to avoid the use of violence. But "A conspiracy can generally be established only by circumstantial evidence. It is not often that the direct fact of a common unlawful design can be proved other than by the establishment of independent facts bearing on such design." (*People v. Robinson* (1954), 43 Cal.2d 132, 136 [1] [271 P.2d 865]; *People v. Steccone* (1950), 36 Cal.2d 234, 237-238 [2, 3] [223 P.2d 17]; cases collected in 5 McKinney's New Calif. Digest, Conspiracy, § 23.)

---

[2]Those acts are as follows:

No. 1. That defendant Osslo had a conversation with Harry Lundeberg on October 13, 1955.

No. 2. That Dimitratos and Hazel came to San Diego on October 15, 1955.

No. 3. That McFaden, at the request of Osslo, made reservations for three rooms about October 14.

No. 4. That McFaden, Dimitratos, and Hazel met on October 15.

No. 5. That Hazel and Dimitratos met at the Butchers' local on October 17.

No. 6. That Dimitratos, Hazel, Meyer and other representatives of the Butchers met at Tang's Market on October 18.

No. 7. That Dempster, Cacio, and Tucker met in San Diego on October 21.

No. 8. That Dempster, Cacio, Tucker, Dimitratos, and Hazel met in San Diego on October 21.

No. 9. That Dimitratos, Cacio, Tucker, Dempster, and Hazel accompanied McFaden and Meyer to Ferguson's Market on October 22.

No. 10. That Dempster, Cacio, Tucker, Dimitratos, and Hazel were in an automobile leased by the Butchers on October 22.

Nos. 11 through 15. That Osslo or McFadden agreed to pay each of the sailor defendants a weekly salary and expenses.

Undisputed evidence establishes the following facts: After the jurisdictional dispute between the Butchers and the Clerks began, and prior to the assault here, prosecution witness Jackson and defendants Osslo, McFaden, and Meyer, and representatives of the Butchers, met with representatives of the Clerks; Osslo said that the Butchers were going to "show" the Clerks; he said that he was "top man" on the west coast and "that was it." Anticipating violence—assertedly that representatives of the Butchers would be "jumped" by the Clerks—Osslo, through the Sailors Union of the Pacific, imported and employed the five sailor defendants, and defendants McFaden and Meyer assented to their employment. Dimitratos, Hazel, Tucker, and Dempster had been members of the Sailors Union of the Pacific for a number of years, and Cacio, a Teamster, had sailed in the Merchant Marine. Members of the Sailors Union of the Pacific had participated in other labor disputes to which that union was not a party and had committed an assault and battery in connection with one such dispute.

It is a reasonable inference that Osslo, McFaden, and Meyer, who had been actively and extensively engaged in union affairs, knew of such participation and assault and battery. Pretending concern for their own safety, but never asking police protection, Osslo, with the assent and aid of McFaden and Meyer, set up a situation which inferentially was designed to, and which clearly did, increase the likelihood of violence in the jurisdictional dispute. On a view of the

evidence favorable to the prosecution, which the law at this stage of the proceeding requires of us, it is fairly inferrible that Osslo, McFaden, and Meyer at least tacitly understood, anticipated, and agreed that the remaining five defendants would not merely be present to act as "observers" and protect the Butchers from violence, but would and should initiate the violence, which they subsequently did initate, to "show" the Clerks that Osslo indeed "was boss of the West Coast and he would fight for jurisdiction" and "that was it."

Admission and Rejection of Evidence. Defendants urge that it was prejudicial error to admit evidence that members of the Sailors Union of the Pacific participated in other labor disputes to which that union was not a party, and that some of such members (not the defendants here) were guilty of assault and battery in connection with their participation in such a dispute. This evidence, in the light of the other circumstances, including the prior activities of Osslo, McFaden, and Meyer, was properly admitted as tending to show that the last-named defendants contemplated that the employment of the sailor defendants probably would result in acts of violence by the latter defendants.

Evidence was received concerning fights, unconnected with union activities, in 1951 involving Dimitratos and in 1952 involving Dimitratos and Dempster. The evidence was expressly received as to the conspiracy charge only. The trial judge so instructed the jury at the time it was admitted. He further

then instructed them that if they believed the evidence "it would only tend to show the characteristics of a particular defendant in this case, and if that characteristic goes to the offense and if a conspiracy is shown, it would be binding on all the defendants so far as the conspiracy count is concerned." The theory on which this evidence was received is erroneous. That Osslo, with McFaden and Meyer, employed persons who had previously participated in fights unconnected with union activity does not tend to show that those persons were hired with the expectation that they would commit assaults connected with union activity, for there is no showing that Osslo, McFaden or Meyer knew of the 1951 and 1952 altercations. However, in view of the ample evidence that Dimitratos and Dempster participated in the assault and battery here material, and in the light of the circumstances surrounding their importation and employment, it does not appear that the jury could have been misled by evidence that they had been involved in other altercations.

Defendants complain of the admission of evidence of many telephone calls between the defendants and other members of their organizations. This evidence was properly received to show defendants' association; that that association was criminal is shown by the other evidence, viewed as a whole.

Defendants complain of the admission in evidence of the testimony of a police officer concerning the arrest of Clerks Anderson and Weathers on November 1, 1955, after the assault of which defendants

were convicted. This testimony was as follows: Defendant Osslo told the officer that his life had been threatened by Anderson. The officer located Anderson and Weathers was with him. At the officer's request Anderson and Weathers accompanied the officer to the police station. The district attorney, after deputies examined an affidavit furnished by the Butchers on which their charge was based, refused to take action in the matter. The city prosecutor filed charges against Anderson, but they were dismissed. This testimony tends to show that defendant Osslo, after the assault, attempted to harass the Clerks by unsubstantiated accusations and to distract emphasis from the charges against him by countercharges; it was thus admissible as tending to show that Osslo was a conspirator carrying on an effort to make good his declaration that he "was boss of the West Coast and he would fight for jurisdiction," and not, as he argues, the innocent employer of persons who were to act as "observers" or at the most to show the Clerks that the Butchers were protected, without the exercise of force.

Defendants complain that the trial judge refused to permit Jackson to testify that on October 13, 1955, defendant McFaden reported to Jackson and defendant Osslo that he had been frightened by a group of Clerks at Ferguson's Market. This testimony was relevant to the purpose of the employment of the sailor defendants and should have been admitted, but in the light of the entire record its exclusion certainly did not prejudice defendants.

The Crime of Conspiracy to Commit Assault. Defendants urge that the charge of "Conspiracy to Commit the Crime of Assault (PC 182)" is not a charge of a crime under the laws of this state because no statute prescribes a punishment for such a crime. Section 182 of the Penal Code provides in material part:

"If two or more persons conspire:

"1. To commit any crime. [Subdivisions 2 through 6 enumerate specified objects of criminal conspiracy.] . . .

"They are punishable as follows: [The next three paragraphs prescribe the punishment for conspiracy to commit crimes against certain officials, for conspiracy to commit any other felony, and for conspiracy to commit two or more felonies which have different punishments.] . . .

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail for not more than one year, or in the State prison for not more than three years, or by a fine not exceeding five thousand dollars ($5,000) or both."

According to defendants, conspiracy to commit a misdemeanor assault is not one of the acts "described in this section." But, as defendants concede, it was held in *Doble v. Superior Court* (1925), 197 Cal. 556, 565 [2] [241 P. 852] (where the question was whether section 182 of the Penal Code provided punishment for a conspiracy to violate the Corporate Securities Act), that "it was the legislative intention that the

words 'any crime' should include all crimes—whether felonies or misdemeanors—which are known to the laws of this state and whether defined and made punishable by the Penal Code or by any other law or statute of this state," and (p. 566 [5] of 197 Cal.) "the words 'any of the other acts described in this section' were meant to, and do in fact, include all other conspiracies to commit crimes or acts prohibited by the section [182] regardless of whether they are denounced by subdivision 1 or any other subdivision thereof." We conclude that the Doble case is applicable here.

Misconduct of the District Attorney. Certain specifications of misconduct of the prosecuting attorney, hereinafter discussed, present the most nearly substantial basis for attacking the verdicts, but the evidence so overwhelmingly supports the implied findings that it does not appear reasonable to believe that the misconduct was a contributing factor in the jury's arriving at such verdicts.

Defendants complain of a press release of the prosecuting attorney which was published before trial. This press release stated that the defendants were attempting to delay trial. In this connection the record indicates that on the day the case was to have gone to trial in the regular criminal department (Department 4), that department was engaged in a trial. The presiding judge in Department 2 was willing to select a jury to be used for actual trial in Department 4 and for that purpose the case was transferred from Department 4 to Department 2. Defense counsel announced defendants' willingness to

be tried in Department 2, either with or without a jury, but objected to having a jury selected by one judge and then having the actual trial proceed before another judge. The case was thereafter continued in Department 2 from time to time for a week until Department 4 was available for selection of the jury and further trial. The press release to the effect that defendants were attempting to delay the trial appears unfair; defendants were merely objecting, as they had a right to do, regardless of whether their objection was or was not meritorious, to the procedure (described by the presiding judge as "standard procedure in this County") of having a jury selected by one judge and the actual trial conducted by another judge. However, it does not appear that the newspaper statement prejudiced defendants in the eyes of the jury which tried their case. The trial judge, in accord with the request of defendants' counsel, specifically admonished the jurors to pay no attention to this article and generally admonished them to pay no attention to newspaper articles.

During the *voir dire* examination of the prospective jurors the prosecuting attorney asked such questions as "You don't believe that might makes right?," "And do you feel that a person, because he is a member of a labor union, deserves to get beat up once in a while?," and "You wouldn't permit sympathy or the feeling to 'Let's give him another chance' to influence your decision in this matter?" These questions, of which defendants complain, were not improper; they were designed to elicit relevant

information concerning the prospective jurors' state of mind. The question, "You know a clerk was beaten?," of which defendants complain, was not in the circumstances improper and certainly could not be prejudicial; the fact was indubitably established and it concerned the very subject of the assault charge which the jurors were being selected to try. Other questions complained of by defendants need not here be quoted; they were either proper or not prejudicial.

Complaint is made of the following matters in the prosecuting attorney's opening statement: The prosecuting attorney said, "Mr. Max J. Osslo was a member of the 1955 Grand Jury that returned the indictment." Defense counsel, moving to strike the statement, said, "Although everybody knows that, it is incompetent, irrelevant and immaterial." In view of the concession that "everybody knows that" it does not appear that the mention of the fact before the jury could have prejudiced defendants.

The prosecuting attorney stated at some length details concerning the secretary-treasurer of another Butchers' local being "worried about Osslo and worried about goons." Evidence concerning this matter was subsequently excluded. It does not appear that the reference to the matter could have prejudiced defendants. This and other references to "goons" by the prosecuting attorney were no more improper, in the light of the evidence developed by the prosecution, than would be a reference to "thieves" in a case in which defendants were on trial for larceny.

The trial judge instructed the jury before the taking of evidence began, as well as at the close of the case. In the course of his preliminary instruction he commenced to read an instruction concerning assault with a deadly weapon which the prosecuting attorney had incorrectly included in his requested instructions. The judge immediately stopped reading and asked the prosecuting attorney if it was his contention that a deadly weapon was used. The attorney answered, "No. By means of force," but then said, "A prize fighter is a weapon?" This remark or query was improper, as was the request for an instruction concerning assault with a deadly weapon. But these incidents, not persisted in before the jury, do not appear to have been prejudicial.

Defendants complain that during the course of trial the prosecution brought into the courtroom and the sight of the jury a board on which were pictures referred to by counsel as "rogue's gallery" photographs of the defendants, made at the time of their arrest. The court declined to permit the use of these photographs in evidence. It is defendants' position that the prosecution, knowing that the photographs were improper, brought them into the courtroom in a manner such that the jury saw them and were prejudiced. The record does not disclose that the jury saw these photographs clearly or at length, but only that there was a dispute between prosecution and defense counsel as to whether they could readily have been seen by the jury. In the circumstances, even assuming that the jury did see the photographs,

it is not shown that defendants were harmed. The jury were clearly and repeatedly instructed that they must determine the facts from the *evidence* produced in court, and that they must not consider any offer of evidence which was rejected by the court.

Objection was made and sustained to two questions of the prosecution as to whether Mr. Lundeberg supplied "strong arm men" for use in labor disputes. The use of the term "strong arm men," in the light of the evidence of circumstances under which the sailor defendants were employed by the Butchers, appears more realistic than prejudicial. In a pretrial statement of defendant Osslo in connection with his motion to quash the indictment it is admitted that "Osslo turned to Harry Lundeberg for help. This procedure in labor circles is not considered unusual. The mere presence of some formidable appearing men to accompany his business representatives he felt both would 'offset the pressure' and reduce the possibility of 'designs of injury.'"

A witness testified that a person whom she had seen at the time of the assault "is the second gentleman," indicating the defendant Cacio. The prosecuting attorney said, "I object to the use of the word 'gentleman.'" In contrast to what occurred in *People v. Williams* (1942), 55 Cal. App. 2d 696, 700-702 [131 P. 2d 851], the trial judge here immediately rebuked the prosecuting attorney and admonished the jury to disregard his remark. In the circumstances, the rebuke and admonishment appear sufficient to cure any harm which might have resulted from the prose-

cuting attorney's highly improper remark, and the Williams case is not authority to the contrary.

A police officer testified that he saw two of the sailor defendants in Osslo's office. The prosecuting attorney asked, "As a matter of fact, if you hadn't seen them in Osslo's office you would have run them out of town?" This question followed the officer's testimony that "I didn't like a couple of big, husky men walking around as bodyguards and gave the appearance of being toughs of the worst sort." Defense counsel objected that the prosecuting attorney's question was misconduct and the trial judge said, "That is uncalled for, Mr. O'Laughlin [the prosecuting attorney]. Don't repeat it. Proceed." It does not appear, in the light of the trial judge's rebuke, and of the facts that the jurors had ample opportunity to determine from personal observation whether the defendants were "big, husky men," and were admonished that they must decide the issues of fact on the evidence before them, not upon remarks of counsel, that the improper question was prejudicial.

The prosecuting attorney asked defendant Dimitratos, when Dimitratos was testifying, "As a matter of fact, any time Lundeberg gets in any type of dispute that he is out for a jurisdictional grab it is the old Communist slogan he uses——." Defense counsel interrupted with an objection and the trial judge sustained the objection and directed the jury to "disregard it." In the circumstances the interrupted, improper question does not appear to have been prejudicial.

Twice defense counsel objected to the prosecuting attorney's "yelling" at the defendant Cacio while Cacio was being cross-examined. On each occasion the trial judge replied that the prosecuting attorney could use any tone of voice which he wished to use. Although conceivably there could be circumstances under which the court's ruling might be questionable, it is not shown that the asserted "yelling" intimidated the witness or harmed defendants. Hence, we cannot determine that the ruling was either erroneous or prejudicial.

In closing argument the prosecuting attorney referred to a case in which "a man died in the gas chamber" because of a battery, assertedly similar to that administered to the clerk Maurer by the sailor defendants, which resulted in the death of a woman. The judge promptly admonished the prosecuting attorney to "Confine yourself to this case." It does not appear that the defendants were harmed by the reference to the homicide case.

Defendants complain of the reference of the prosecuting attorney to Mr. Lundeberg and Mr. Jackson as "unindicted co-conspirators." The reference, although unfair to those gentlemen in the sense that they were not before the court and thus were not in a position to answer the charge, could not have been prejudicial to the defendants. It suggested only that entirely tenable view of the evidence which was taken by the prosecuting attorney and which we must presume was taken by the jury. Hence it did not constitute misconduct.

The prosecuting attorney in argument stated, "Meyer is the finger man." We have discovered no evidence to this effect. It appears that any prejudicial effect of the reference was corrected by the trial judge's prompt admonition that "The jury will remember the evidence. . . . [I]f the evidence isn't there the inference isn't there and they will disregard it."

It is to be noted that the prosecuting attorney at the beginning of his argument said, "what I am about to say is not evidence and if, in any way your version of the evidence is different than mine, you please take your own version of it." And the judge clearly and repeatedly instructed the jury that they were to decide the case on the basis of the *evidence* and further clearly instructed them that arguments of counsel were not evidence.[3]

Defendants object to statements in argument of the prosecuting attorney that Mr. Lundeberg was "a bed fellow of Harry Bridges," that "It is two per cent his [Lundberg's] fight against Communism and ninety-eight per cent his grab for jurisdictional power," and other similar statements. These statements were

[3]The judge told the jury, among other things, that "it is up to you to determine what the facts are from the evidence introduced at the trial. . . . You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. . . . [Y]ou must determine the facts from the evidence produced here in court," and "argument of counsel on both sides is not evidence. . . . Whatever they say about the evidence, if you find that to be true, why you follow it. If whatever either side said about the evidence doesn't correspond with your views as you heard the evidence as it came in, why you disregard any comments they made and follow the evidence as you see it."

made in reply to defense counsel's argument that "The Sailors Union was the only thing that stood between complete Communist control of the Maritime industry since 1935 and Harry Lundeberg personally was responsible for that on every occasion. He held that Sailors Union right and the Sailors Union had to fight in order to hold itself to keep from coming under the Bridges' control, as every other Maritime Union did." In the circumstances the statements of the prosecution were not prejudicial.

The Conditions of Probation. Defendants argue that the conditions of probation exceeded the trial judge's power by reason of the provision that defendants Osslo, McFaden, and Meyer shall not, during the 10-year probationary period, hold any union position or receive remuneration from any union. However, since it could be and presumably was found that these defendants are guilty of crimes growing out of union activities, it appears not improper that restrictions be placed upon such activities as a condition of probation.

The granting of probation is entirely within the sound discretion of the trial court; a defendant has no right to probation; he does have the right, if he feels that the terms of probation are more harsh than the sentence imposed by law, to refuse probation and undergo such sentence. (*People v. Frank* (1949), 94 Cal. App. 2d 740, 741-742 [211 P. 2d 350].) In the Frank case the defendant, a pediatrician, was convicted of contributing to the delinquency of a minor by a lewd act committed on a child in a plaster

cast. It was held proper that the terms of his probation include the requirement that defendant not practice medicine during the five years he was on probation. The court specifically rejected the argument, similar to the argument of defendants Osslo, McFaden, and Meyer here, that the condition of probation was unreasonable and beyond the power of the court.

Defendants are mistaken in their argument that the trial judge imposed on Osslo, McFaden, and Meyer county jail sentences and independently of such sentences granted periods of probation. Each probation order expressly suspends imposition of sentence and provides that probation is granted on the condition, among others, that defendant spend a designated number of months in the county jail.

It does not appear that the trial judge had power to impose the following terms in his probation orders: "that this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case." An individual judge (as distinguished from a court) is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of that court, and the jurisdiction which the judge exercises is the jurisdiction of the court, not of the judge. Rules of court which provide that post-trial proceedings in a cause shall be heard by the judge who tried the matter are entirely proper, but the individual judge

cannot order that such proceedings must be heard by him.

The Asserted Channeling of the Case Into a Particular Department. By stipulation this case was set for trial on July 9, 1956. All proceedings up to and including the making of the stipulation were had in Department 4 (Judge John A. Hewicker). The minutes of Department 4 show that on July 9 the cause was transferred to Department 2 (Presiding Judge Turrentine) for trial. Actually, the reporter's transcript shows, the transfer was for the purpose of selecting a jury only. The reporter's transcript further shows that, as already indicated, defense counsel refused to accede to the procedure of having a jury selected in Department 2 while the trial then pending in Department 4 was being completed and then having the cause transferred to Department 4 for completion of trial. Defense counsel moved that the cause be assigned to any available department for immediate trial. The court stated, "Motion granted, and the first court available will be Judge Hewicker, the regular criminal department. . . . [T]he case will be continued until two o'clock at which time the defendants, and all attorneys, and the jury is asked to return. If we are not ready then, why we will have to have continuances half a day at a time until we have a court available to try this case. I can't tell you exactly when that will be, but the case in Judge Hewicker's court may terminate at any moment . . . or it may take the rest of the week, but there is no alternative to that procedure . . ." De-

fense counsel objected to the continuance "on the ground that there are courts available and that there is going to be a civil trial to be started in one of the Superior Courts this morning, and a criminal case has precedence over a criminal [sic] case." The court said, "Objection overruled."

The cause was continued two or three times each day until July 16, when selection of a jury began in Department 4 before Judge Hewicker. On numerous occasions defense counsel objected to the continuances, pointed out that civil cases were commenced in other departments and that a jury had been selected in another department to try a criminal case which was originally set for trial later than defendants' case, and urged that the continuances were "part of the plan to channel a case into a particular court."

Judge Turrentine, in overruling one of defense counsel's objections to a continuance, explained at some length the reasons for the continuances. He said that "the case was originally pending in that Department [4] and was to go to trial there and it was only sent to this Department by Judge Hewicker for the purpose of getting a jury to try the case. . . . [I]n view of the objection to me trying—to me selecting a jury the only thing that could logically happen would be that it would go back to the Department where it originated and should be because Department 4 is the Presiding Criminal Department, and I am complying with the suggestion and request of Judge Hewicker."

Judge Turrentine further stated that the selection of a jury by a department other than the one in which the case was to be tried "is almost routine in this County. So we assumed . . . that on July 9th we would proceed in this Department to select the jury in order to give you a speedy trial and this was done at the request and suggestion of Judge Hewicker. It necessitated a very considerable rearrangement of business in this County to do it. We have four regular judges either away or assigned to duty on the District Court of Appeal, and, of course, we have the rather long trial in Department 4 going on. It is our general policy in criminal cases to give preference to the trial of those criminals who are incarcerated in jail so if they are deprived of their liberty unlawfully they may have their day in court and get out in preference to those who have the financial means to make bail . . . [Defendants were at liberty on bail.] If it were not for the fact that we had members of the San Diego County Bar who were willing to serve as judges pro tem without compensation to themselves we would just simply be bogged down with nothing but a number of these short jury trials where the defendants are in jail awaiting trial."

The judge went on to explain the condition of the calendar in various departments, pointing out that a jury trial of a person confined as mentally ill was being had in one department, that the juvenile calendar was "very congested," and that "today we have three criminal trials going on out of five regular judges, one regular and two pro tems . . ."

Defendants contend that the continuance of the case after the date set for trial, when civil cases were being tried in other departments, was in violation of section 681a of the Penal Code ("The welfare of the people of the state of California requires that all proceedings in criminal cases shall be heard and determined at the earliest possible time. It shall be the duty of all courts and judicial officers and of all district attorneys to expedite the hearing and determination of all such cases and proceedings to the greatest degree that is consistent with the ends of justice") and the provision of section 1050 of that code that "Criminal cases shall be given precedence over all civil matters and proceedings."

It does not appear that the policy of sections 681a and 1050 was disregarded. Judge Turrentine's explanation of the condition of the calendar shows that defendants were not being deprived of precedence over civil cases for any arbitrary reason and that the continuances to enable trial in Department 4 were not made for the purpose of improperly channeling the case into that department. Rather, it appears that the orderly administration of a crowded calendar required the continuances to enable trial of the case in a proper department. The precedence to which criminal cases are entitled is not of such an absolute and overriding character that the system of having separate departments for civil and criminal matters must be abandoned. And certainly it does not appear, as defendants suggest, that the "channeling" of this cause to Department 4, where it had been from its

inception, was an improper channeling to a particular judge as an individual rather than as the judge of the presiding criminal department.

For the reasons above stated, the provisions by which the individual judge purported to retain jurisdiction of the cause are stricken from the orders granting probation. In all other respect such orders, and the judgments and order denying a new trial, are affirmed.

Schauer, J.

Shenk, J., Spence, J., and McComb, J., concurred.

DISSENTING OPINION

I dissent.

This case demonstrates, more than any other which has come under my observation, the abuse of our conspirary statute. While the statute has a salutary objective, it may become a weapon in the hands of an overzealous prosecutor to make felonies out of mere misdemeanors and thus inflict great injustice upon people who are entirely innocent of any crime, but who may have had some connection or association with a person who has committed a misdemeanor. Under the holding of the majority in this case, it would be possible to obtain a felony conviction against all five occupants of an automobile for illegal parking, a misdemeanor, for which the driver of the car was entirely responsible. Take the case where a city ordinance prohibits parking within 10 feet of a fire plug—a car with five persons in it parks within the restricted zone. A police officer arrests all five

occupants on the theory that the illegal parking was the result of an agreement between them—conspiracy to violate the parking ordinance. Under the majority holding here, the mere presence of the five in the automobile would give rise to a permissible inference of conspiracy to violate the parking ordinance and all five could be prosecuted and convicted of conspiracy which is a felony under section 182 of the Penal Code (*People v. Malotte*, 46 Cal. 2d 59 [292 P. 2d 517]) and all five could be sentenced to a state prison even in the face of their uncontradicted testimony that none of them except the driver had anything to do or say about the parking of the car. Such an outrageous travesty would be no greater than the prosecution, verdicts, judgments, sentences and affirmance of the judgments in this case. The foregoing statement is based upon the undeniable fact that there is not one word of testimony or any evidence in the record in this case of any agreement or understanding between any of the defendants that any crime would be committed by any defendant or that any conspiracy existed between them to violate any law, and there is no basis whatever for an inference that such a conspiracy existed.

The majority has quoted extensively from the testimony of some of the witnesses, but in all of this testimony there is not even a suggestion that there was an agreement or understanding between the defendants that any of them would commit a crime or that there was a plan, design or scheme to violate any law in any respect whatsoever, and the majority

opinion does not refer to any evidence in the record which even remotely gives rise to an inference that a conspiracy existed between the defendants to violate a law.

True, a misdemeanor may have been committed by one or more of the defendants, but it requires something more than legal reasoning or judicial interpretation to find evidence of a conspiracy between the defendants that any defendant should engage in the commission of an unlawful act.

The record shows that a jurisdictional dispute existed in San Diego County between the local butchers' union and the local retail clerks' union. The butchers' union was of the opinion that its members should handle certain merchandise such as frozen TV dinners rather than members of the clerks' union. Defendant Osslo was secretary-treasurer of the butchers' local, McFaden and Meyer were business agents for the same union. Four of the other five defendants were members of the Sailors Union of the Pacific and Cacio was a member of the Teamsters' Union who had come from San Francisco to San Diego to accompany and protect the business agents of the butchers' local. The five defendants arrived in San Diego several days prior to October 22, 1955, and were in contact with Osslo, McFaden and Meyer; they attended a butchers' union meeting on October 21st. The record shows that these five defendants were paid weekly by the butchers.

The altercation out of which this case arose took place in Ferguson's Market in Chula Vista. The facts

giving rise to the fight in which one Maurer, a retail clerk, was struck and injured are hotly disputed and present a very close question.

Defendants' major contentions are these:

(1) That there is no evidence that they conspired to commit assault;

(2) That the district attorney was guilty of prejudicial misconduct in numerous instances;

(3) That the court committed prejudicial error in the admission and exclusion of certain evidence;

(4) That the punishment imposed as to defendants Osslo, McFaden and Meyer is improper, excessive and unauthorized under the laws of the state and constitutes cruel and unusual punishment in violation of the Constitution.

The evidence, fairly stated, is as follows:

Early in September, 1955, there had been a strike of the butchers at the Food Basket Market in Pacific Beach which was authorized by Osslo, who was secretary-treasurer of the local union as well as the President of the Western Federation of Butchers, and the executive board. This strike arose over some 23 disputed items containing meat which were handled in the grocery department. After the strike in which about 20 persons were involved, the market brought an action for an injunction, and after the hearing, the items were taken off sale. On October 13, 1955, there was a retail clerks' strike at Ferguson's Market and there were pickets carrying signs. Outside the market, there were about 25 persons including busi-

ness agents for the clerks and butchers, as well as some butchers employed elsewhere. Defendants Osslo, McFaden and Meyer claim that they were threatened at this time by members of the clerks' union and that as a result Harry Lundeberg of the Sailors Union of the Pacific was contacted and requested to send some men to accompany them during their rounds of checking contracts to see that they were not jumped from behind or injured by members of the clerks' union. Defendants Dimitratos and Hazel arrived in San Diego and reported to McFaden and on October 19th accompanied Jackson (butchers' union) and Meyer to Tang's market where they were, apparently, threatened by a member of the clerks' union who had a switch-blade knife and an outsider who had a gun. Osslo was contacted in Honolulu and advised Dimitratos to get some additional assistance which he did in the persons of Dempster, Cacio and Tucker.

On October 22nd, Osslo, McFaden and Meyer, accompanied by the five other defendants, visited several markets in San Diego. They arrived at Ferguson's Market at about 11 o'clock in the morning for the purpose of seeing one Linnville, partner and manager of the market. They were told to return at 1 o'clock. At 1 o'clock Dimitratos, Cacio, Hazel, Jackson, Meyer, Woodard, Dempster, Tucker and McFaden returned and went into the market. McFaden, Jackson and Meyer stayed near the entrance talking to Linnville; Hazel went to the back to talk to a young lady in the delicatessen department (the young lady testified that Hazel was with her at the time of

the assault); Dimitratos went to the back and observed the meat department at the right; Tucker and Cacio, who had been to Tia Juana the night before and who had been drinking heavily, went in search of buttermilk and when they did not find it turned back and came across Maurer and Montgomery who were representatives of the Clerks from outside San Diego. Defendants claim that as Dempster walked past them, followed by Tucker and Cacio, Maurer put his foot out; that Dempster saw it and stepped over it, but that Tucker, thinking Maurer was trying to trip him, stepped on Maurer's foot; that Maurer struck at Tucker and missed and hit Cacio; that Cacio struck back at which time Maurer grabbed Cacio by the testicles and lifted him off the ground; that Tucker and Cacio then struck Maurer until he dropped Cacio and Maurer went down; that Cacio and Tucker thought Maurer was reaching for a gun and Tucker kicked him until he was knocked out. Dempster came back and caught Cacio who was in great pain. Montgomery had disappeared at the first sign of trouble.

Dempster took Cacio whose trousers were torn and who was in pain to one of the two cars. He then asked McFaden for the keys and Dimitratos, Hazel, Cacio and Dempster then drove off looking for the Ace Motel where they were staying. They lost their way and were picked up by the police who found that Cacio and Tucker had been drinking and noted Cacio's condition and that of Tucker's hands. Maurer arrived at the police station that afternoon and identified them.

A bakery clerk at the market said that Tucker, Cacio and Dempster were the ones responsible for the beating. Maurer's testimony implicated Dimitratos in the fight; and showed that he thought he had hit Cacio in the stomach; that up until the time he was called a foul name and had been hit he did nothing at all to provoke a fight; that he and Montgomery had been trying to leave the store when they were "surrounded" by men. An organizer for the Clerks testified that Dempster was also in the fight; that Dimitratos and Hazel attempted to "get" Montgomery by chasing him.

The record contains testimony from both members of the clerks' and butchers' unions who were working in the market. A member of the Butchers testified that Maurer was "looking for trouble" on the day in question. The Clerks, on the other hand, testified that Maurer was just standing and minding his own business. It is obvious from the record that the testimony from both sides of the controversy was diametrically opposed.

The police officers testified that they had been alerted by radio from the Chula Vista police department; that when they stopped the car, Cacio, Dempster, Dimitratos and Tucker got out; that Cacio and Tucker said that "someone" had been reaching for a gun; that Tucker's hand was red and swollen; that Cacio's trouser leg was torn in two places at the thigh and that the men had been drinking. Dempster stated to the police that he had come from San Francisco on a vacation with his friends Tucker and Cacio; that

he knew Dimitratos was in San Diego; that he did not know anything about a fight; that he knew nothing about a dispute between the Butchers and Clerks; that he had not attended a union meeting and that he had nothing to do with the butchers' union. Tucker stated that he had come to San Diego with Cacio to do some drinking and visit Tia Juana; that he had not come with Dempster; that he had nothing to say about going to Ferguson's Market; that he had attended a union meeting; that he had heard about the jurisdictional dispute between the Butchers and Clerks. He denied any connection with the butchers' union; he denied that the butchers' union had hired him to come to San Diego. Dimitratos told the officers he had come to San Diego with Hazel for a vacation; that they were staying at the Grant Hotel; that he had spent time with his friend McFaden; that he had not, nor had his friends, been involved in the fight at Ferguson's Market. Cacio denied being employed by the butchers' union; or that he had any interest in, or knowledge of, the dispute between the Butchers and the Clerks. Hazel's answers to police questions were also confusing and inconsistent. Meyer denied being at Ferguson's Market on the day of the fight.

The People allege the following overt acts with respect to the conspiracy to commit assault count:

(1) That Osslo had a conversation with Harry Lundeberg, on or about October 13, 1955, in San Diego;

(2) That Dimitratos and Hazel met in San Diego on or about October 15, 1955;

(3) That McFaden, at Osslo's request, made reservations for three rooms at the U. S. Grant Hotel in San Diego on or about October 14, 1955;

(4) That McFaden, Dimitratos and Hazel met at the U. S. Grant Hotel on or about October 15, 1955;

(5) That Dimitratos and Hazel met at Butchers' Local 229, 227 E. Street, San Diego, on or about October 17, 1955;

(6) That Dimitratos, Hazel and Meyer, and other representatives of butchers' local met at Tang's Market, 4508 Cass Street, San Diego on or about October 18, 1955;

(7) That Dempster, Cacio and Tucker met in San Diego, on or about October 21, 1955;

(8) That Dempster, Cacio, Tucker, Dimitratos and Hazel met at the Ace Motel, San Diego, on or about October 21, 1955;

(9) That Dempster, Cacio, Tucker, Dimitratos and Hazel accompanied McFaden and Meyer to Ferguson's Market in Chula Vista on or about October 22, 1955;

(10) That Dempster, Cacio, Tucker, Dimitratos and Hazel were in a certain Ford sedan leased by butchers' local in San Diego on October 22nd;

(11) That Osslo and/or McFaden agreed to pay Dimitratos his expenses and a weekly salary on or about October 15, 1955;

(12) (13) (14) (15) That there was a similar agreement with Hazel, Tucker, Dempster and Cacio.

The People argue that from the above alleged overt acts, a jury could reasonably infer that a conspiracy to commit assault existed between the defendants; that the jury could reasonably determine that Osslo, with the knowledge and approval of McFaden and Meyer procured the services of the five sailor defendants for the purpose of intimidating the Clerks "by their appearance *and that if this was not sufficient, of perpetrating an assault upon a clerk who should happen into their proximity.*"

There is evidence in the record which tends to prove all of the alleged overt acts. As I read the record, however, there is no evidence (*and the People point to none*) that the fight was planned, or premeditated, or that any of the proved overt acts lead to that conclusion. Assuming that Cacio provoked the altercation and that Maurer did not (although the evidence is extremely close on that point) telephone calls between the defendants, payment of expenses, salaries, and the making of hotel reservations, do not lead to the conclusion that the defendants were engaged in a conspiracy to commit an assault. The People argue, by quoting from the remarks made by the trial court, that because the five defendants were furnished bail, counsel, and their salaries were paid after the assault, that the assault had been planned between all defendants prior to its commission. In *People v. Williams*, 30 Cal.App.2d 234 [85 P.2d 974], relied on by the People, there was direct evidence that a conspiracy existed to commit assault. The same is also true of the case of *People v. Dail*, 22 Cal.2d 642 [140 P.2d

828], relied upon by the People. It is my conclusion that the alleged and proved overt acts charged against these defendants do not support the judgment convicting them of conspiracy to commit assault.

Misconduct of District Attorney

It is the defendants' contention that the district attorney engaged in a course of prejudicial misconduct during the course of the *voir dire* examination of prospective jurors, throughout the course of the trial, and during the arguments to the jury. Defendants cite numerous examples of misconduct, among which are the following:

On *voir dire* examination, prospective jurors were asked whether they felt that "any segment of our society should be immune from the law" or "should take the law unto themselves" and whether they felt that because a person was a "member of a labor union, [he] deserves to get beat up once in awhile"; whether (after the sustaining of an objection) the prospective juror felt that "might makes right"; whether because the Clerks and Butchers had settled their difficulties it would cause the prospective juror to adopt a "let's forget it" attitude; whether the prospective juror felt that "the community might have some interest in the matter"; whether the prospective juror had read "Victor Riesel's column 'Inside Labor'"; whether any of the people in the jury box had read the column; whether the prospective juror realized that every time the district attorney introduced a "bit of evidence in this case that in some

way or other I am going to be prejudicing these defendants in your eyes"; that the juror realized "don't you, that we are not up here in a criminal department to elect Mr. San Diego"; that "if in the course of this trial and as you examine the facts surrounding the beating of the clerk in Chula Vista, if you become aroused, and as a public citizen as to what happened, will you try and remove that from your mind and just try the case on the evidence and the Court's instructions and use that to arrive at your conclusion"; whether the prospective juror had heard that Mr. Osslo was a member of the grand jury that indicted him. (An objection was sustained to the last question.) It should be here noted that defense counsel objected throughout the course of the questioning that the questions were argumentative; that the district attorney was attempting to prejudice the jury; that the questions were irrelevant and immaterial; that the questions were for the purpose of inflaming the minds of the jurors.

During the opening statement, the district attorney again referred to the fact that Osslo had been a member of the grand jury that indicted him and defense counsel's objection was overruled. The district attorney then stated that the evidence would show that "in the middle of October, 1955, another person was worried about Osslo and worried about goons." When defense counsel asked what the last word was, the district attorney replied: "Goons. Another man was worried about Osslo and about goons. G-o-o-n-s (spelling). That man is Mr. Herb De Motte. He is

a Secretary-Treasurer of a Butchers Local in Wilmington." Defense counsel's objection was overruled and the district attorney then made a long and involved statement concerning the internal affairs of the butchers' union and the difficulties between De Motte and Osslo; that De Motte was afraid of "goons. He was afraid to hold meetings." The district attorney's statement was obviously an attempt to show that Osslo was a man to be feared because he would set "goons" upon any person with whom he disagreed. Defense counsel's objections were overruled and the district attorney told the jury that De Motte would testify as to his fear of "goons." The defendants were constantly referred to as "goons."

Prior to the taking of testimony, the trial court inadvertently started to instruct the jury concerning assault with a deadly weapon. When defense counsel objected that no use of a weapon had been charged and that the evidence would show that no weapon had been employed, the district attorney asked his co-counsel in the hearing of the jury: "A prize fighter is a weapon?" Also assigned as misconduct is the fact that before the court had ruled on the matter, and during a conference in chambers concerning the admissibility thereof, a board containing photographs of all the defendants, some of which were taken on the day they were arrested, was so carried and placed in the courtroom that it was visible to the jury.

During the course of the trial, a witness was asked if he knew that Harry Lundeberg supplied "strong arm men in the labor movement." When an objection was sustained, the district attorney again asked if the

witness knew whether or not on any prior occasion Lundeberg sent strong arm men into jurisdictional disputes or disputes with management. When a witness referred to Cacio as the "second gentleman there . . ." the district attorney said, "I object to the use of the word 'gentleman.'" The district attorney also managed to get in evidence the general strike in Oakland in 1948, or 1949, the Wall Street strike in 1948, the Western Union strike in 1952, the United Financial Employees strike in 1948, in an attempt to show that Harry Lundeberg furnished "strong-arm" men from the Sailors of the Pacific to aid in the strikes. To all of this evidence, defense counsel's objections were overruled. The district attorney in his questioning referred to sending two sailors out to "bird dog Anderson" and to sending two sailors out "to finger Anderson." When Captain Roland, a police officer, testified that he "didn't like a couple of big, husky men walking around as bodyguards and [that they] gave the appearance of being toughs of the worst sort. I didn't like it, but it wasn't their physical appearance, other than they were big and husky," the district attorney asked him "As a matter of fact, if you hadn't seen them in Osslo's office you would have run them out of town?" In questioning the defendant Dimitratos, the district attorney asked: "As a matter of fact, any time Lundeberg gets in any type of dispute that he is out for a jurisdictional grab it is the old Communist slogan he uses. . . ."

During closing argument to the jury, the district attorney stated "Incidentally, let me say this: a man died in the gas chamber not too long ago for just this

type of conduct. He beat a woman in the face and when she fell he kicked and killed her and he died for that." He also stated: "Incidentally, while mentioning him, let me say this: one or more of the jurors may say, 'Well, that Jackson was in this thing and he was at the scene and he did as much as some of the other people. Why isn't Jackson indicted? Why isn't Lundeberg indicted?' Those are unindicted co-conspirators. That shouldn't concern you here. In other words. . . ." After objection, the court stated that the district attorney's "remarks weren't directly in conformity with the Indictment. The indictment does not name them as unindicted co-conspirators, but if he feels under the evidence they are coconspirators he may so state." After other objections, the court again stated that if the district attorney felt that "some of his witnesses were co-conspirators he may so tell the jury, if he bases it on the evidence." The district attorney also told the jury "You hear about the great man, Harry Lundeberg, that is clearing the waterfront of Communists. Let me say this: Harry Lundeberg, Barney Mayes and Harry Bridges were all bed fellows at one time. . . ." After being told by the court to proceed with his argument, the district attorney said: "The water tenders, the firemen and what have you is an independent union and Lundeberg, in his grab for power, has used that old slogan to grab these unions, so that is malarky when they try to inject Communism in this case. It has been something Lundeberg used to control the docks. It is two percent his fight against Communism and

ninety eight per cent his grab for jurisdictional power. That is what it amounts to. So don't let them get you off base on this big man who, as I said, was a bed fellow of Harry Bridges back in the thirties. Bridges sponsored him to be head of the Maritime Federation of the Pacific." After the court told the district attorney to confine himself to the evidence, he said: "So that fellow Lundeberg, don't get any misconception about him. That fellow Lundeberg, where were the Communists on Wall Street when they had five hundred men——

"The Court: Mr. O'Laughlin, I kept that out of evidence.

"Mr. O'Laughlin: Well, where were the Communists in the Western Union strike? When old Thompson got beat up because he happened to cross a picket line? None of that at all. Lundeberg—and the reason we were bringing it in, counsel says what has Wall Street to do with it and the general strike in Oakland, or what has the Western Union strike to do with it. It shows a pattern that Lundeberg supplies the noise and the muscle. He can swing a jurisdictional dispute; he can swing an election. You and I might be members of a union and be sore at the particular administration and we might want it out for one reason or another, but if the pack that is in brings down the muscle, brings down some of Lundeberg's boys, we are going to be silenced because we are going to be afraid of our lives, afraid to open our mouths, because if we do we might get the treatment Maurer and Thompson got." When this was objected to by

defense counsel as unsupported by the evidence and as improper and inflammatory, the court merely told the district attorney to "Proceed."

While numerous additional instances of the same type of conduct could be cited, it appears that the above is sufficient to show that the district attorney was guilty of prejudicial misconduct insofar as all of these defendants are concerned. As we said in *People v. Dail,* 22 Cal.2d 642, 650 [140 P.2d 828], "It is also true, however, that in a close case where the evidence is sharply conflicting, substantial and serious errors vital to defendant that may have resulted in a miscarriage of justice must be regarded as prejudicial and grounds for reversal. (*People v. Silver,* 16 Cal.2d 714, 723 [108 P.2d 4].)" In the case at bar, the district attorney managed to interject much immaterial and irrelevant matter concerning strikes, the use of pickets, and assaults in other strikes which could not have had any other effect than to prejudice these defendants who were not claimed to have taken part therein. Further, the numerous references to the defendants as "goons," "strongarm" men, "muscle" men, and the objections to the term "gentleman" as applied to one of the defendants were highly inflammatory and prejudicial, as were the district attorney's references to Lundeberg as a former Communist. From the district attorney's comments, arguments and questions, it appears that the entire labor movement was on trial and that anyone connected therewith was suspect as a participant in the trial of this particular case. Such conduct is reprehensible and should not

be condoned. In *People v. Lyons*, 47 Cal.2d 311, 318 [303 P.2d 329], we said, quoting from *Viereck v. United States*, 318 U.S. 236, 248 [63 S.Ct. 561, 87 L.Ed. 734]: "'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'" Here, as in *People v. Teixeira*, 136 Cal. App.2d 136 [288 P.2d 535], ". . . it is hard to believe that this experienced prosecutor asked them [questions] in good faith and for any purpose other than to degrade defendants." In *People v. Vienne*, 142 Cal.App.2d 172 [297 P.2d 1027], it was held that the district attorney is bound to refrain from making inflammatory statements (see also *People v. Wilkes*, 44 Cal.2d 679 [284 P.2d 481]); in *People v. Henderson*, 144 Cal.App.2d 706 [301 P.2d 468] (where the same district attorney was involved), it was held prejudicial and reversible error for the prosecutor to state or imply the existence of facts concerning which no evidence had been introduced.

ADMISSION AND EXCLUSION OF EVIDENCE

It is first claimed by the defendants that the court erred in admitting the testimony of Captain Hodson. This testimony included the admission in evidence of part of the log book of the steamship Luckenbach concerning a fight in *1952* in which defendants Dimitratos and Dempster were involved. Defendants contend, and their counsel argued at the time the evidence was admitted that the evidence was immaterial, irrelevant, too remote from the San Diego incident, and that it was prejudicial error for the prosecution in the first instance to put in evidence the bad character of the defendants. The trial court also permitted the People to put in evidence testimony that defendant Dimitratos had been stabbed in a fight on board ship in *1951;* and that Dempster and Hazel were in the same crew. In *People v. Teixeira*, 136 Cal.App. 2d 136, 148 [288 P.2d 535], *People v. Adams*, 76 Cal. App. 178 [244 P. 106], *People v. Nunley*, 142 Cal. 441 [76 P. 45], it was held that such evidence was inadmissible as an attack on the character of the defendant by the prosecution and constituted prejudicial error. In *People v. Lyons*, 47 Cal.2d 311, 317 [303 P.2d 329], where the prosecution alluded on the cross-examination of the defendant's wife to a prior conviction of defendant, we said: "It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions to be *improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury.*" (Emphasis added.) (See also *People v.*

Hardy, 33 Cal.2d 52, 61 [198 P.2d 865]; *People v. McKelvey,* 85 Cal.App. 769, 771 [260 P. 397].)

The above evidence was held admissible by the trial court on the theory that a conspiracy had been charged even though the People did not contend that the conspiracy had dated back to 1951 and 1952. Defense counsel's motion to stirke was denied by the trial court. From the trial court's remarks, it is obvious that the evidence was held admissible on the theory that a *conspiracy presently existed* between all defendants.

The evidence was inadmissible on any theory and its prejudicial effect is at once apparent.

The admission of evidence concerning the Wall Street strike, the general strike in Oakland and the Western Union strike has heretofore been commented upon in the discussion concerning the prejudicial misconduct of the district attorney. The trial court's statement that "The reason I let this testimony in was to show other instances where the members of the Sailors Union were used and what transpired, to show the demeanor of the sailors used on the picket lines. In this conspiracy count you are entitled to know all the surrounding circumstances of the people that were employed in the incident down here, if one happened," and the court's later admission that there was an entirely different group of sailors in San Diego, clearly show the error that was committed. The case at bar involved an assault and a conspiracy to commit an assault and the fact that other sailors were used in picket lines in other areas remote in

place and time is completely immaterial and irrelevant and was highly prejudicial to the defendants in the case at bar. (*People v. Lyons,* 47 Cal.2d 311 [303 P. 2d 329]; *People v. Hardy,* 33 Cal.2d 52, 61-62 [198 P.2d 865]; *People v. Wynn,* 44 Cal.App.2d 723, 732-733 [112 P.2d 979]; *People v. Freitas,* 34 Cal.App.2d 684, 687 [94 P.2d 397]; *People v. Stafford,* 108 Cal. App. 26, 29-31 [290 P. 920].)

Defendants contend that the court erred in excluding testimony offered by them to show that threats had been made against some of them which necessitated the request to Lundeberg for bodyguards to accompany the Butchers' business agents on their rounds. Inasmuch as the evidence is in sharp conflict as to which side started the fight, this testimony should have been admitted. If threats had been shown to have been made against the business agents of the Butchers by members of the clerks' union, the evidence would be admissible as tending to prove the defense theory that the five defendants were summoned to San Diego to act as bodyguards only and to disprove the People's theory that a conspiracy to commit assault existed between all eight of the defendants.

Punishment of Osslo, McFaden and Meyer as Improper, Excessive and Unlawful

Osslo and McFaden were each fined $1,500 to be paid from their own funds; Meyer was fined $750 to be paid from his own funds.

Osslo and McFaden were ordered to serve six months in the county jail; Meyer was ordered to serve three months in the county jail.

These three defendants were placed on 10 years' probation, during which time they could hold no union office and receive no salary for any union services, or participate in any union negotiations. In addition, these defendants were required to fill out an annual affidavit that the fine payments were made from their own funds and that they held no union office, etc., and "*further, that this Court and Judge shall retain jurisdiction of this matter throughout the said period of probation and no other department of the Court or other Judge shall modify this order without notice to the Judge who tried the case. . . .*"

Defendants argue that the terms of their probation cut off their ability to earn a livelihood; that said terms violate the principle back of probation which "is defined as an act of grace and clemency, which may be granted by the court to a seemingly deserving defendant, whereby he may escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted." (*People v. Hainline*, 219 Cal. 532, 534 [28 P.2d 16]; *Lee v. Superior Court*, 89 Cal. App.2d 716, 717 [201 P.2d 882]) and that it violates the principle that the terms and conditions of probation must be reasonable under all the circumstances (*In re Trombley*, 31 Cal.2d 801, 811 [193 P.2d 734]).

While these three defendants were found guilty of both conspiracy to commit assault, and assault with force likely to produce great bodily harm, it is apparent from the record that they were not involved in the actual assault. Defendants claim, with merit, that it is impossible to determine whether they were convicted of a felony or a misdemeanor since they were

charged with and found guilty of conspiracy to commit assault and charged with, and found guilty of, assault with force likely to produce great bodily injury.

Defendants' arguments in this respect have merit. It appears that the terms of probation are such as would deprive defendants of their means of livelihood and also violate the principles of probation. The purpose of probation is not to impose penalties (*In re Hays*, 120 Cal.App.2d 308, 310 [260 P.2d 1030]; *In re Martin*, 82 Cal.App.2d 16, 22 [185 P.2d 645]). It is my opinion that the trial court was guilty of an abuse of discretion with respect to the terms and conditions of probation imposed on defendants Osslo, McFaden and Meyer.

Errors in the Majority Opinion

The Evidence:

I have heretofore set forth a fair statement of the evidence as it relates to the case at bar. We are here concerned with evidence to support a judgment of conviction of *conspiracy* to commit assault. There is no doubt that an assault was committed by *some* of the defendants. Defendants Osslo, McFaden and Meyer were not involved in the actual assault and the People do not so argue. The majority opinion quotes at length from the testimony of one Jackson, a business agent for the Butchers. Nothing said by the witness, or quoted in the majority opinion, leads to the conclusion that these defendants were engaged in a conspiracy to commit assault. The majority makes much of the statements of the witness that the police force was not called for protection rather than members

of the sailors' union, that older, unemployed members of the butchers' union of San Diego were not called upon to act as observers and that members of other San Diego labor unions were not called upon. The witness' testimony regarding his belief that members of the Butchers had reason to fear violence from the Clerks is quoted extensively in an endeavor by the majority to show that no such fear could reasonably have existed. In the first instance there is no law that I am aware of which would require these defendants to ask police protection or to hire any particular segment of society to act as their observers. I also know of no law prohibiting the hiring of a bodyguard for protection. It also appears to me highly unlikely that any police force would have sufficient men available to accompany members of labor unions on their rounds in order to *prevent* trouble which at that time was only a possibility. Insofar as the fear of trouble was concerned and any threats, by conduct, or otherwise, made by members of the Clerks to members of the Butchers were concerned it appears to me that fear is subjective and that these men, who were there at the time, were far more able to recognize it than the members of the majority of this court who only know what appears in the record as we see it today.

Because defendant Osslo said he was "top man" on the west coast and "that was it" and because he said the Butchers would "show" the Clerks, the majority infers that Osslo "set up a situation which inferentially was designed to, and which clearly did, increase the likelihood of violence in the jurisdictional dispute.

On a view of the evidence favorable to the prosecution, which the law at this stage of the proceeding requires of us, it is fairly inferable that Osslo, McFaden, and Meyer at least tacitly understood, anticipated that the remaining five defendants would not merely be present to act as 'observers' and protect the Butchers from violence, but would and should initiate the violence, which they subsequently did initiate, to 'show' the Clerks that Osslo indeed 'was boss of the West Coast and he would fight for jurisdiction' and 'that was it.' " *No such inferences can be fairly drawn from the record.* It should be borne in mind that the conspiracy charged here was to commit assault—*not* a conspiracy to make Osslo "boss" of the west coast! There is absolutely nothing in the record from which an inference may be drawn that Osslo intended the five defendants to "initiate" violence and in the state of this record with its numerous instances of prejudicial misconduct and the close question of fact presented concerning just which labor union instigated the altercation, this court should not concern itself with drawing such an inference. Because *other* members of the sailors' union had participated in other labor union disputes in other parts of the country in 1948, 1949 and 1952, and had, *according to the majority*, been guilty of assault and battery in connection therewith, we are told that we may infer that Osslo, McFaden and Meyer knew that these defendants would *initiate* violence. So far as this record is concerned we do not know whether or not the members of the sailors' union engaged in those other strikes were the guilty ones in the crime of assault and bat-

tery. For all we know, the other parties involved may have been the guilty ones and the sailors' members completely innocent. Even if the members of the sailors' union involved in those other strikes were the guilty ones, should every member of a labor union to which he must belong if he is to earn his livelihood be held guilty of the same crime? The question answers itself and shows the fallacy in the reasoning of the majority. That reasoning carries the philosophy of "guilt by association" to its ultimate extreme.

ADMISSION AND REJECTION OF EVIDENCE:

The majority feels that the admission of evidence concerning other and remote labor disputes in which other members of the sailors' union were involved was not prejudicial error when considered in the "light of other circumstances, including the prior activities of Osslo, McFaden and Meyer" to show that these men "contemplated that the employment of the sailor defendants probably would result in acts of violence by" the other five defendants. First we are told to rely on the asserted violent tendencies of other members of the sailors' union to show that Osslo, McFaden and Meyer are guilty as charged and, secondly, that "the prior [unexplained] activities" of the three men made such evidence admissible because it showed their knowledge that violence would result. There is absolutely nothing in the record to show any connection between the other strikes in which other members of the sailors' union participated and any of these defendants except that some of them belonged to the sailors' union.

The majority finds that the jury could not have been misled because of the admission of evidence of fights, unconnected with labor activities, which occurred in 1951 and 1952, and which occurred on board ships on which Dimitratos and Dempster were sailors. It is said that "in light of the circumstances surrounding their importation and employment, it does not appear that the jury could have been misled by evidence that they had been involved in other altercations." The only reason for the admission of such evidence would be to show the allegedly bad character of these two defendants and was wholly inadmissible as I have heretofore pointed out and such evidence has, up until this case, been held to constitute an unwarranted attack on the character of a defendant and to constitute prejudicial error. The question is not one of misleading the jury but goes to the question of due process in that every person accused of a crime is entitled to a fair trial on the merits of his particular case.

Concerning the admission of evidence of telephone calls between the defendants and other members of their organizations of which the defendants complain, the majority says "This evidence was properly received to show defendants' associations; *that that association was criminal is shown by the other evidence, viewed as a whole.*" This statement assumes the answer to the main question involved—whether defendants *conspired* to commit the assault and battery which occurred. Mere association and telephone calls, the subject matter of which is completely unknown, have never, until now, been sufficient to show that a

conspiracy to commit a crime existed. Under the holding here, no association, no telephone call, can be innocent and immune from a later charge of conspiracy if one of the parties should later be accused of a crime of any type.

With respect to the admission of evidence of the arrest of two members of the clerks' union *after* the assault and battery involved here occurred, and of which defendants complain, the majority says that "This testimony tends to show that defendant Osslo, after the assault, attempted to harass the Clerks by unsubstantiated accusations and to distract emphasis from the charges against him by countercharges; it was thus admissible as tending to show that Osslo was a conspirator carrying on an effort to make good his declaration that he 'was boss of the West Coast and he would fight for jurisdiction,' and not, as he argues, the innocent employer of persons who were to act as 'observers' or at the most to show the Clerks that the Butchers were protected, without the exercise of force." The conspiracy charged here was that of assault and battery, *not* the promotion of Osslo as "boss" of the west coast. The assault and battery had occurred before the arrest of the clerks and hence the conspiracy, if any, had been terminated. To be admissible, the act or declaration must have been made during the pendency and *prior to the termination of the enterprise and in furtherance of the common design* (*People v. Brown*, 59 Cal. 345; *Estate of Strachan*, 166 Cal. 162 [135 P. 296]; *Budd v. Morgan*, 187 Cal. 741 [203 P. 754]; *People v. Ferlin*, 203 Cal.

587 [265 P. 230]; *People v. Smith,* 151 Cal. 619 [91 P. 511]; *People v. Kynette,* 15 Cal.2d 731 [104 P.2d 794]; *People v. Steccone,* 36 Cal.2d 234 [223 P.2d 17]).

The majority holds that the exclusion of evidence concerning McFaden's report to Jackson and Osslo that he had been frightened by the Clerks could not, in the "light of the record" have prejudiced defendants. This evidence was patently admissible under the defendants' theory and should have been admitted. It is clearly seen that evidence damning to them is held properly admitted while evidence in their favor is held properly excluded. A fair trial encompasses all the relevant and material admissible evidence whether favorable, or unfavorable, to either side. A fair trial does not mean a trial where the prosecution uses every means, whether fair, or foul, to gain a conviction and no court should condone such a practice. As we said in *People v. Lyons,* 47 Cal.2d 311, 317 [303 P. 2d 329], it would be an impeachment of the legal learning of counsel for the People to intimate that he did not know that what he was doing was improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury. Counsel for the People knew, or should have known, that his conduct and a great deal of the evidence produced by him was wholly irrelevant and that it was "peculiarly calculated to prejudice" the defendants in the eyes of the jury. He should also have known that evidence relevant to defendants' side of the case was admissible and a part of the entire background of the American system of jurisprudence—a fair trial.

MISCONDUCT OF THE DISTRICT ATTORNEY:

I have heretofore set forth in detail some of the instances in which the district attorney was guilty of prejudicial misconduct and the majority has cited some additional examples, all of which were calculated to and did inflame the minds of the jurors. The majority, however, finds that "the evidence so overwhelmingly supports the implied findings that it does not appear reasonable to believe that the misconduct was a contributing factor" in arriving at the verdicts. As I have pointed out at length the evidence is far from overwhelming—it is nonexistent so far as a conspiracy is involved since the overt acts, in and of themselves, while proved, do not lead to the inevitable conclusion that defendants conspired to commit assault and battery. The overt acts charged consisted of a number of conversations and meetings between the defendants, a labor meeting at which defendants were present, hotel reservations made for some of the defendants; defendants' presence in cars leased by the butchers' local of San Diego; salaries agreed to be paid to the five defendants by Osslo or McFaden. There was no proof, either direct or circumstantial, of what the conversations were at either the meetings or at the labor meeting; there was no proof either direct or circumstantial that at any of the times charged, defendants conspired to commit assault and battery. The majority, however, infers that all of these meetings were used for an evil and unlawful purpose and concludes that the evidence against all the defendants is so "overwhelming" that no misconduct could have prejudiced the defendants in the eyes of the jury.

It can hardly be doubted that the interjection of Communism in the case was prejudicial to the defendants as was the use of the words "goon," "finger man," "strong-arm men," and "toughs." All of these things tended to attack the character of the defendants so as to prejudice them in the minds of the jurors and from the state of the record were obviously calculated to do just that by the prosecutor.

An admonition to the jury to decide the case on the evidence produced is insufficient to cure the errors and misconduct which occurred in this case. A reading of the record shows that from the *voir dire* examination of prospective jurors, throughout the trial, and until its close, the prosecution was guilty of a deliberate attempt to harass, embarrass, and prejudice these defendants. The majority finds nothing wrong with the trial judge permitting counsel for the People to "yell" at one of the defendants while on the stand. It is said that the record does not show that the "yelling" intimidated the witness. The district attorney is a representative of the People and as such is not "at liberty to strike foul" blows. Here, as in *People v. Teixeira*, 136 Cal.App.2d 136 [288 P.2d 535], " . . . it is hard to believe that this experienced prosecutor" yelled at a witness "in good faith and for any other purpose other than to degrade" him.

CONDITIONS OF PROBATION:

I have heretofore discussed these conditions and my reasons for feeling that they were excessive and in violation of the principle of probation. The majority

cites *People v. Frank*, 94 Cal.App.2d 740, 741-742 [211 P.2d 350], as authority for its holding that the punishment imposed was perfectly proper. In the Frank case the defendant was himself guilty of committing a crime. In the case at bar, defendants Osslo, McFaden and Meyer were not guilty of the actual assault and it is only by means of the improper use of the conspiracy statute that they are in any way involved. As I have pointed out the record shows a total lack of evidence that these defendants conspired with the others to commit the crime with which they were charged and a majority of this court, in affirming the judgments of conviction and the terms of probation, has deprived these three defendants of their means of earning a livelihood since they may not even work as the most menial of laborers in their own union and cannot receive remuneration "from *any* union." The terms of probation are wholly out of line with the cases holding that probation is an act of grace and clemency for the purpose of permitting rehabilitation of a defendant who is "seemingly deserving" and for the purpose of permitting him to "escape the extreme rigors of the penalty imposed by law for the offense of which he stands convicted" (*People v. Hainline*, 219 Cal. 532, 534 [28 P.2d 16]; *Lee v. Superior Court*, 89 Cal.App.2d 716, 717 [201 P.2d 882]).

Summation

In my opinion:

1. The judgment should be reversed with directions to dismiss the charge of conspiracy to commit assault

as to all defendants because of the total lack of evidence in the record to support the charge.

2. The record shows that only the defendants, *Cacio, Tucker* and possibly *Dempster* and *Dimitratos*, could have engaged in the assault. There is *no* evidence to show that it was other than a spontaneous assault and, in view of the sharp conflict in the evidence as to the person responsible for starting the altercation and the prejudicial misconduct of the district attorney, as well as the highly prejudicial character of the evidence erroneously admitted (as heretofore discussed), the judgments should be reversed as to them in order that they may have a fair trial on the merits. We held in *People v. Lyons*, 47 Cal.2d 311, 319 [303 P.2d 329], that "It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law (*Powell v. Alabama* [1932], 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527])."

3. Since there is no evidence which tends to connect defendants Osslo, McFaden, Meyer and Hazel with the actual assault, the trial court should be directed to dismiss as to these defendants the charge of assault by means of force likely to produce great bodily injury.

Carter, J.

Gibson, C.J., and Traynor, J., concurred.

Filed March 26, 1958.

William I. Sullivan, Clerk.